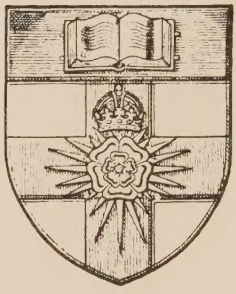
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

299
315

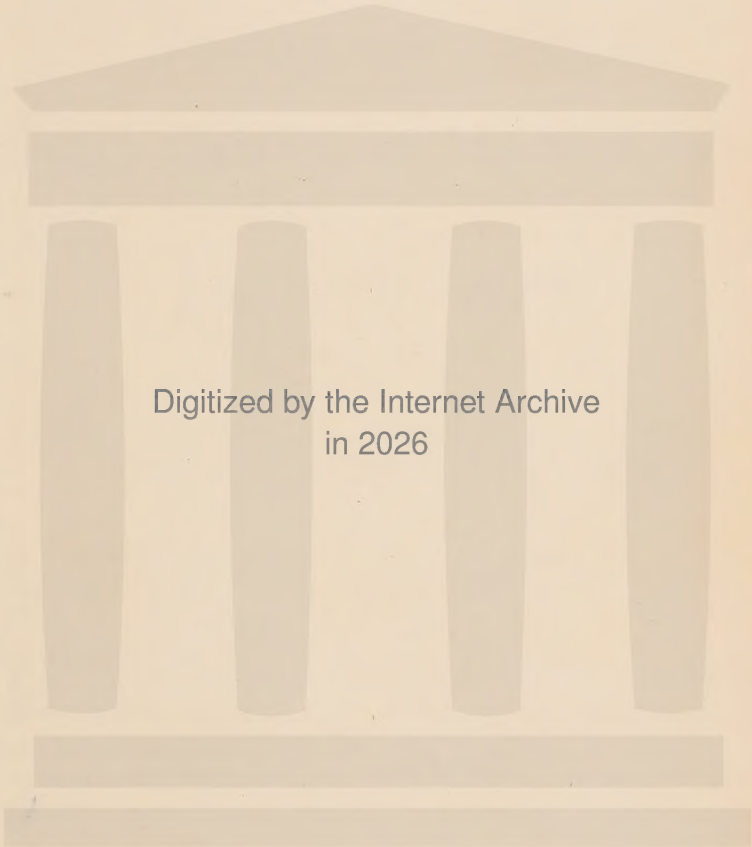
UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4 Mx. North Gallery



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-house-of-lords_1897

1897.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

House of Lords—English and Irish Appeals and Peerage Cases	J. M. MOORSOM, Q.C.	
House of Lords—Scottish and Divorce Appeals and Scottish Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-Law.*

1897.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

JUDGES AND LAW OFFICERS.

MEMORANDA.

In the Vacation after Michaelmas Sittings, 1896, THE RIGHT HONOURABLE SIR E. E. KAY, *resigned his office as one of the Lords Justices of Appeal.*

1897. *Jan.* 9. THE HONOURABLE SIR JOSEPH WILLIAM CHITTY, *one of the Justices of the High Court of Justice, was appointed one of the Lords Justices of Appeal.*

Jan. 18. EDMUND WIDDRINGTON BYRNE, *Q.C., was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

March 24. THE HONOURABLE SIR ARTHUR CHARLES *resigned his office as one of the Justices of Her Majesty's High Court of Justice.*

April 21. EDWARD RIDLEY, *Q.C., was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

July 28. THE RIGHT HONOURABLE SIR HENRY CHARLES LOPES, *one of the Lords Justices of the Court of Appeal and a member of the Judicial Committee of the Privy Council, was created a Baron of the United Kingdom by the title of* BARON LUDLOW, *of Heywood, in the county of Wilts.*

In the Vacation after Trinity Sittings, 1897, THE HONOURABLE SIR LEWIS CAVE, *one of the Justices of the High Court of Justice, died, after a short illness, at the age of* 65.

In the same Vacation THE RIGHT HONOURABLE LORD ESHER *resigned his office as Master of the Rolls, and* THE RIGHT HONOURABLE LORD LUDLOW *resigned his office as one of the Lords Justices of Appeal.*

LORD ESHER *was afterwards created a Viscount of the United Kingdom by the title of* VISCOUNT ESHER, *of Esher, in the county of Surrey.*

Oct. 25. THE RIGHT HONOURABLE SIR NATHANIEL LINDLEY, *Lord Justice of Appeal, was appointed Master of the Rolls in the room of* LORD ESHER.

THE HONOURABLE SIR RICHARD HENN COLLINS, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal.*

Oct. 28. CHARLES JOHN DARLING, *Q.C., was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

Nov. 2. THE HONOURABLE SIR ROLAND LOMAX BOWDLER VAUGHAN WILLIAMS, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal; and* ARTHUR MOSELEY CHANNELL, *Q.C., was appointed one of the Justices of the High Court of Justice. He was afterwards knighted.*

Nov. 6. *An order was made by the Lord High Chancellor, by virtue of the powers vested in him by s.* 2 *of the Companies (Winding-up) Act,* 1890, *and s.* 5 *of the Supreme Court of Judicature Act,* 1894, *that the jurisdiction of the High Court under the Companies (Winding-up) Act,* 1890, *should until further order be exercised by* THE HONOURABLE MR. JUSTICE WRIGHT *(being the Judge of the High Court who, for the time being, exercises the Bankruptcy Jurisdiction of the High Court) sitting and acting for the purpose of the exercise of such jurisdiction as an additional Judge of the Chancery Division.*

Nov. 21. THE HONOURABLE SIR CHARLES EDWARD POLLOCK, *one of the Justices of the High Court of Justice, died, after a short illness, at the age of* 74.

Dec. 1. SIR WALTER GEORGE FRANK PHILLIMORE, BARONET, *was appointed one of the Justices of the High Court of Justice.*

ERRATA.

Page	*Line*	*For*	*Read*
284	7 from the end	s. 7	s. 20.
377	2	*Henderson* v. *Shanklin*	*Henderson* v. *Shankland.*
384	note (3)	4 H. & N. 564	4 H. & N. 565.
384	10 from the bottom	*Reg.* v. *Jobson*	*Reg.* v. *Tolson.*
385	8 „ „		
629	foot-note (4)	[1894] A. C. 136	[1895] A. C. 136.
711	„ (2)	3 D. M. & G. 204	3 D. M. & G. 904.

The Mode of Citation of the Volumes of the Law Reports, commencing January 1, 1897, will be as follows:—

In the First Series,
[1897] 1 Ch. [1897] 2 Ch.

In the Second Series,
[1897] 1 Q. B. [1897] 2 Q. B. [1897] P.

In the Third Series,
[1897] A. C.

The Scottish Law Reports are cited as follows:—

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	„	„	„	.	.	„	D.
Macpherson, or, Third Series	„	„	„	.	.	„	M.
Rettie, or, Fourth Series	„	„	„	.	.	„	R.
Scottish Law Reporter	„	„	„	.	.	„	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aberdeen District Tramways Company, Ogston *v.*	H. L. (Sc.) 111
Ackland, Chastey *v.*	H. L. (E.) 155
Attenborough & Son, Clutton *v.*	H. L. (E.) 90
Attorney-General, Sudeley (Lord) *v.*	H. L. (E.) 11
Attorney-General for the Dominion of Canada *v.* Attorney-General for Ontario	P. C. 199
Attorney-General for Ontario, Attorney-General for the Dominion of Canada *v.*	P. C. 199
Attorney-General for Quebec *v.*	P. C. 199
Brewers and Maltsters' Association of Ontario *v.*	P. C. 231
Attorney-General for Quebec *v.* Attorney-General for Ontario	P. C. 199

B.

	PAGE
Bank of Australasia *v.* Palmer	P. C. 540
Bank of New South Wales *v.* Piper	P. C. 383
Barraclough *v.* Brown	H. L. (E.) 615
Beauchemin, Larocque *v.*	P. C. 358
Belize Estate and Produce Company *v.* Quilter	P. C. 367
Beneficed Clerk *v.* Lee	P. C. 226
Bensaude *v.* Thames and Mersey Marine Insurance Company	H. L. (E.) 609
Birmingham Vinegar Brewery Company *v.* Powell	H. L. (E.) 710
Bloomenthal *v.* Ford	H. L. (E.) 156

PAGE

Boulter *v.* Kent Justices H. L. (E.) 556
Brewers and Maltsters' Association of Ontario *v.* Attorney-General for Ontario – P. C. 231
British India Steam Navigation Company, "Mary" Tug Company *v.* The "Meanatchy" P. C. 351
Brown, Barraclough *v.* H. L. (E.) 615

C.

Carew, *Ex parte* – – P. C. 719
Chastey *v.* Ackland H. L. (E.) 155
Clarke *v.* Dunraven (Earl of). The "Satanita" H. L. (E.) 59
Clutton *v.* Attenborough & Son H. L. (E.) 90
Cory Brothers & Co. *v.* "Mecca" (Owners of Turkish Steamship). The "Mecca." H. L. (E.) 286
Crossman & Prichard, Hood-Barrs *v.* – – H. L. (E.) 172
Currie *v.* M'Knight H. L. (Sc.) 97

D.

Dassenaike, Gauder *v.* – P. C. 547
De Beers Consolidated Mines, Kimberley Waterworks Company *v.* – – – P. C. 515
Derby Corporation *v.* Derbyshire County Council – H. L. (E.) 550
Derbyshire County Council, Derby Corporation *v.* H. L. (E.) 550
De Trafford, Kennedy *v.* H. L. (E.) 180
Dunraven (Earl of), Clarke *v.* The "Satanita" – H. L. (E.) 59

E.

"Edenbridge" (Owners of Steamship) *v.* Green. The "Rutland" – H. L. (E.) 333
Edison General Electric Company *v.* Westminster and Vancouver Tramway Company P. C. 193

F.

Fine Art and General Insurance Company, Nevill (Lord William) *v.* – – H. L. (E.) 68
Fleming, London and Lancashire Life Assurance Company *v.* P. C. 499
———, Lord Advocate *v.* H. L. (Sc.) 145
Ford, Bloomenthal *v.* H. L. (E.) 156
Foxwell *v.* Van Grutten. Van Grutten *v.* Foxwell H. L. (E.) 658

G.

Gas Float Whitton No. 2 (Owners of), Wells *v.* The Gas Float Whitton No. 2 H. L. (E.) 337
Gaskell, Gosling *v.* H. L. (E.) 575
Gauder *v.* Dassenaike – P. C. 547
Gerard (Lord) *v.* Kent County Council – – H. L. (E.) 633
Godmanchester Corporation, Simpson *v.* – – H. L. (E.) 696
Gosling *v.* Gaskell – H. L. (E.) 575
Governments Stock and Other Securities Investment Company *v.* Manila Railway Company – – – H. L. (E.) 81
Green, "Edenbridge" (Owners of Steamship) *v.* The "Rutland" – – H. L. (E.) 333
"Greta Holme" (Owners of SS.), Steam Sand Pump Dredger (Owners of No. 7) *v.* The "Greta Holme" H. L. (E.) 596
Grey *v.* Manitoba and North Western Railway Company of Canada – – – P. C. 254

H.

Hamini *v.* Tillekeratne – P. C. 277
Hathorn, Salisbury Gold Mining Company *v.* – – P. C. 268

PAGE

Heriot, Hood Barrs *v.* H. L. (E.) 177
Hood Barrs *v.* Crossman & Prichard – – H. L. (E.) 172
——— *v.* Heriot H. L. (E.) 177
Hopkinson's Patent, *In re* P. C. 249

K.

Kennedy *v.* De Trafford H. L. (E.) 180
Kent County Council, Gerard (Lord) *v.* – – H. L. (E.) 633
Kent Justices, Boulter *v.* H. L. (E.) 556
Kimberley Waterworks Company *v.* De Beers Consolidated Mines – – – P. C. 515
Kingston (Mayor and Council of), Kington Race Stand *v.* P. C. 509
Kingston Race Stand *v.* Kingston (Mayor and Council of) P. C. 509
"Kwang Tung" (Owner of SS.) *v.* "Ngapoota" (Owners of SS.). The "Ngapoota" P. C. 391

L.

Lambeth Overseers *v.* London County Council – H. L. (E.) 625
Larocque *v.* Beauchemin – P. C. 358
Lee, Beneficed Clerk *v.* – P. C. 226
London and Lancashire Life Assurance Company *v.* Fleming P. C. 499
London County Council, Lambeth Overseers *v.* H. L. (E.) 625
Lord Advocate *v.* Fleming H. L. (Sc.) 145
Love, Wavertree Sailing Ship Company *v.* – – P. C. 373

M.

M'Knight, Currie *v.* H. L. (Sc.) 97
M'Nab *v.* Robertson H. L. (Sc.) 129

PAGE

Manila Railway Company, Governments Stock and Other Securities Investment Company *v.* – – H. L. (E.) 81
Manitoba and North Western Railway Company of Canada, Grey *v.* – – – P. C. 254
"Mary" Tug Company *v.* British India Steam Navigation Company. The "Meanatchy" P. C. 351
Master in Equity of Supreme Court of Victoria *v.* Pearson P. C. 214
"Meanatchy," The. "Mary" Tug Company *v.* British India Steam Navigation Company P. C. 351
"Mecca" (Owners of Turkish Steamship), Cory Brothers & Co. *v.* The "Mecca" H. L. (E.) 286
Metropolitan Life Assurance Society, West Derby Union *v.* H. L. (E.) 647
Montreal (City of) *v.* Standard Light and Power Company P. C. 527

N.

Nevill (Lord William) *v.* Fine Art and General Insurance Company – – H. L. (E.) 68
"Ngapoota" (Owners of SS.), "Kwang Tung" (Owner of SS.) *v.* The "Ngapoota" P. C. 391
"Normandie" (Owners of SS.) *v.* "Pekin" (Owners of SS.). The "Pekin" – – P. C. 532

O.

Ogston *v.* Aberdeen District Tramways Company H. L. (Sc.) 111

P.

Palmer, Bank of Australasia *v.* P. C. 540

	PAGE
Pearse *v.* Schweder & Co. P. C.	520
Pearson, Master in Equity of Supreme Court of Victoria *v.* P. C.	214
"Pekin" (Owners of SS.), "Normandie" (Owners of SS.) *v.* The "Pekin" – – P. C.	532
Perth General Station Committee *v.* Ross – H. L. (Sc.)	479
Piper, Bank of New South Wales *v.* – – – P. C.	383
Powell, Birmingham Vinegar Brewery Company *v.* H. L. (E.)	710

Q.

Quilter, Belize Estate and Produce Company *v.* – P. C.	367

R.

Renner, *Ex parte* – – P. C.	218
Robertson, M'Nab *v.* H. L. (Sc.)	129
Ross, Perth General Station Committee *v.* – H. L. (Sc.)	479
Royal Insurance Company *v.* Watson – – H. L. (E.)	1
Russell (Earl) *v.* Russell (Countess) – – – H. L. (D.)	395
"Rutland," The. Owners of Steamship "Edenbridge" *v.* Green – – H. L. (E.)	333

S.

Saffery, Welton *v.* H. L. (E.)	299
Salisbury Gold Mining Company *v.* Hathorn – – P. C.	268
Salomon *v.* Salomon & Co. H. L. (E.)	22
Salomon & Co. *v.* Salomon H. L. (E.)	22
"Satanita," The. Clarke *v.* Dunraven (Earl of) H. L. (E.)	59
Schweder & Co., Pearse *v.* P. C.	520
Sigcau, Sprigg *v.* – – P. C.	238
Simpson *v.* Godmanchester Corporation – – H. L. (E.)	696
Sinclair's Divorce Bill H. L. (D.)	469
Sprigg *v.* Sigcau – – P. C.	238
Standard Light and Power Company, Montreal (City of) *v.* P. C.	527
Steam Sand Pump Dredger (Owners of No. 7) *v.* "Greta Holme" (Owners of SS.). The "Greta Holme" H. L. (E.)	596
Sudeley (Lord) *v.* Attorney-General – – H. L. (E.)	11

T.

Thames and Mersey Marine Insurance Company, Bensaude *v.* H. L. (E.)	609
Tillekeratne, Hamini *v.* P. C.	277

V.

Van Grutten *v.* Foxwell. Foxwell *v.* Van Grutten H. L. (E.)	658

W.

Watson, Royal Insurance Company *v.* – – H. L. (E.)	1
Wavertree Sailing Ship Company *v.* Love – – – P. C.	373
Wells *v.* Gas Float Whitton No. 2 (Owners of). The Gas Float Whitton No. 2 – H. L. (E.)	337
Welton *v.* Saffery – H. L. (E.)	299
West Derby Union *v.* Metropolitan Life Assurance Society H. L. (E.)	647
Westminster and Vancouver Tramway Company, Edison General Electric Company *v.* P. C.	193

TABLE OF CASES CITED.

A.

		PAGE
Abrath *v.* North Eastern Railway	11 App. Cas. 247	385
Acey *v.* Fernie	7 M. & W. 151	499
Ackroyd *v.* Smith	10 C. B. 164	698
Adam *v.* Newbigging	13 App. Cas. 308	29
Addlestone Linoleum Company, In re	37 Ch. D. 191	304
Agency Company *v.* Short	13 App. Cas. 793	512
Agricola, The	2 Wm. Rob. 10	335
Aline, The	1 Wm. Rob. 111	98
Almada and Tirito Company, In re	38 Ch. D. 415	303, 360
Altrincham Union *v.* Cheshire Lines Committee	15 Q. B. D. 597	629
Ambrose Lake Tin and Copper Mining Company, In re	14 Ch. D. 390	28
Argentino, The	13 P. D. 191; 14 App. Cas. 519	599
Arratoon Apcar, The	15 App. Cas. 37	392
Ashby *v.* James	11 M. & W. 542	289
Atholl (Duke of) *v.* Torrie	1 Macq. 65	113
Attorney-General *v.* Abdy	1 H. & C. 266	151
——— *v.* Yelverton	7 H. & N. 306	151
Attorney-General of Ontario *v.* Mercer	8 App. Cas. 767	203
Attorney-General for Quebec *v.* Queen Insurance Company	3 App. Cas. 1090	234
——— *v.* Reed	10 App. Cas. 141	234
Austerberry *v.* Oldham Corporation	29 Ch. D. 750	697

B.

Baglan Hall Colliery Company, In re	L. R. 5 Ch. 346	52
Bangor and Portmadoc Slate and Slab Company, In re	L. R. 20 Eq. 59	303
Bank of England *v.* Vagliano	[1891] A. C. 107	92
Bank of Toronto *v.* Lambe	12 App. Cas. 575	231
Barber *v.* Penley	[1893] 2 Ch. 447	111
Barker *v.* Midland Railway Company	18 C. B. 46	480
Barlee *v.* Barlee	1 Add. 305	413
Barrow-in-Furness Investment Company, In re	14 Ch. D. 400	360
Barwick *v.* English Joint Stock Bank	L. R. 2 Ex. 259	385
Batavier, The	9 Moo. P. C. 286	99
Baxendale *v.* Bennett	3 Q. B. D. 525	91
Baylis *v.* Tyssen Amhurst	6 Ch. D. 500	698
Beadell *v.* Eastern Counties Railway Company	2 C. B. (N.S.) 509; 1 Nev. & Mac. 56	480

		PAGE
Bell, In re	10 Morrell, 15	194
—— *v.* Cade	2 J. & H. 122	618
Bentley's Case	12 Ch. D. 850	360
Birch *v.* Cropper	14 App. Cas. 525	303
Bird *v.* Bird's Patent Sewage Company	L. R. 9 Ch. 358	360
Blair *v.* Hunter, Finlay & Co.	9 M. 204	132
Blewitt *v.* Tregonning	3 A. & E. 554	698
Bobbett *v.* South Eastern Railway Company	9 Q. B. D. 424	511
Bodenham *v.* Purchas	2 B. & Ald. 39	289
Bodmer's Patent	6 Moo. P. C. 468; 8 Moo. P. C. 282	250
Boettcher *v.* Carron Company	23 D. 330	98
Bolckow *v.* Seymour	17 C. B. (N.S.) 106	541
Bold Buccleugh, The	7 Moo. P. C. 267	97
Bower-Barff Patent	[1895] A. C. 675	249
Bradshaw *v.* Lancashire and Yorkshire Railway Company	L. R. 10 C. P. 189	601
Bray *v.* Bray	1 Hagg. Ecc. 163	404
Brigella, The	[1893] P. 189	375
Brighton Corporation *v.* Brighton Union	5 C. P. D. 368	511
Bristol Poor (Governors of) *v.* Wait	5 A. & E. 1	626
British Seamless Paper Box Company, In re	17 Ch. D. 467	28
Broderip *v.* Salomon	[1895] 2 Ch. 323	26
Brown *v.* Whiteway	8 Hare, 145	684
Burchett *v.* Durdant	2 Vent. 311	674
Burgess *v.* Burgess	3 D. M. & G. 904	711
Burgess' Case	15 Ch. D. 507	304
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	158
Burroughs *v.* Burroughs	2 Sw. & Tr. 303; 30 L. J. (P. & M.) 186	399
Burton-on-Trent Corporation *v.* Egginton Overseers	24 Q. B. D. 197	628
Butcher *v.* Stead	L. R. 7 H. L. 839	194
Bywater *v.* A Raft of Piles	42 Fed. Rep. 917	342

C.

Calypso, The	2 Hagg. Adm. 218	340
Capital and Counties Bank *v.* Henty	7 App. Cas. 741; 5 C. P. D. 541	70
Carter *v.* Palmer	8 Cl. & F. 657	182
Case *v.* Storey	L. R. 4 Ex. 319	480
Chasemore *v.* Richards	2 H. & N. 168; 7 H. L. C. 349	132
Cheesman (Steamboat) *v.* Two Ferry Boats	2 Bond, 363	341
City Discount Company *v.* McLean	L. R. 9 C. P. 692	289
City of Peking, The	15 App. Cas. 438	600
Clara, The	102 U. S. 200	356
Clarence, The	3 Wm. Rob. 283	599
Claridge *v.* Hoare	14 Ves. 59	551
Claridge's Patent	7 Moo. P. C. 394	250
Clarke *v.* Dickson	E. B. & E. 148	29
——— *v.* Smith	Com. 72; 1 Salk. 241; 1 Lutw. 798	695
Clayton's Case	1 Mer. 585	286

		PAGE
Cleaver *v.* Cleaver	9 App. Cas. 631	400
Cleopatra, The	3 P. D. 145	341
Cloborn's Case	Hetley, 149	450
Cobb *v.* Great Western Railway Company	[1893] 1 Q. B. 464	601
Collen *v.* Wright	8 E. & B. 647	577
Combe *v.* De la Bere	6 P. D. 157	230
Companhia de Moçambique *v.* British South African Company	[1893] A. C. 602	257
Cooke *v.* Wildes	5 E. & B. 328	71
Cooper *v.* Cooper	13 App. Cas. 88	257
Cope *v.* Vallette Dry Dock Company	16 Fed. Rep. 924; 12 Davis, 625	342
Cory *v.* Bristow	2 App. Cas. 262	629
Cote, Ex parte	L. R. 9 Ch. 27	92
Courtney *v.* Cole	19 Q. B. D. 447	334
Cousen *v.* Cousen	34 L. J. (P. & M.) 139; 4 Sw. & Tr. 164	406
Cowan *v.* Kinnaird	4 M. 236	132
Cowen, Ex parte	L. R. 2 Ch. 563	29
Cox *v.* Hickman	8 H. L. C. 268	578
—— *v.* May	4 M. & S. 159	339
Crooks *v.* Allan	5 Q. B. D. 38	376
Crystal, The	[1894] A. C. 508	615
Currie *v.* Allan	21 R. 1004	97
Curtis *v.* Curtis	1 Sw. & Tr. 192; 4 Sw. & Tr. 234	406

D.

D'Aguilar *v.* D'Aguilar	1 Hagg. Ecc. 773	403
Dalton *v.* Angus	6 App. Cas. 740	790
Davis *v.* Jones	17 C. B. 625	540
Day *v.* Day	L. R. 3 P. C. 751	511
Dent's Case	L. R. 8 Ch. 768	322
Denton *v.* Great Northern Railway	5 E. & B. 860	385
Denyssen *v.* Mostert	L. R. 4 P. C. 236	280
Dillet, In re	12 App. Cas. 459	719
Doe *v.* Goff	11 East, 668	674
—— *v.* Harvey	4 B. & C. 610	673
Driver *v.* Broad	[1893] 1 Q. B. 748	83
Duncan *v.* Findlater	6 Cl. & F. 894	113
Durant *v.* Durant	1 Hagg. Ecc. 733	403
Dysart *v.* Dysart	3 N. of C. 324; 5 N. of C. 194	404

E.

Emmy Haase, The	9 P. D. 81	391
Emulous, The Schooner	1 Sumner, 207	339
Energie, The	L. R. 6 P. C. 306	377
Energy, The	L. R. 3 A. & E. 48	99
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	29, 364
Ettrick, The	6 P. D. 127	619
European and Australian Royal Mail Company *v.* Peninsular and Oriental Steam Navigation Company	14 W. R. 843	343

		PAGE
Evans *v.* Evans	1 Hagg. Cons. 35	398
Ewing, In the Goods of	6 P. D. 19	14
——— *v.* Orr Ewing	9 App. Cas. 34	14, 257
——— *v.* ———	10 App. Cas. 453	14
Eyre *v.* M'Donnell	15 Ir. Ch. Rep. 534	182

F.

Farrar *v.* Farrars	40 Ch. D. 395	28, 182
Fellowes *v.* Clay	4 Q. B. 313	698
Fetherston *v.* Fetherston	3 Cl. & F. 67	674
Field *v.* Carr	5 Bing. 13	290
Fifty Thousand Feet of Timber	2 Lowell's Judgments, 64	341
Fitzmaurice *v.* Jordan	32 L. R. Ir. 112	174
Five Steel Barges	15 P. D. 146	339
Fleming, Fraser & Co., In re	60 L. T. 154	194
Florence Land and Public Works Company, In re	10 Ch. D. 530	83
Forth *v.* Forth	36 L. J. (P. & M.) 122	407
Fothergill's Case	L. R. 8 Ch. 270	360
Foulger *v.* Steadman	L. R. 8 Q. B. 65	492
Fox *v.* Chester (Bishop of)	6 Bing. 1	227
Freeman *v.* Cooke	2 Ex. 654	159
Fryer *v.* Morland	3 Ch. D. 675	151
Furlonger *v.* Furlonger	5 N. of C. 425	404

G.

Gale *v.* Gale	2 Rob. Ecc. 421	405
Gardner *v.* London, Chatham and Dover Railway Company	L. R. 2 Ch. 201	258
Gazelle, The	2 Wm. Rob. 279	599
Gibson, Little & Co., In re	5 L. R. Ir. 139	304
Gill *v.* Continental Gas Company	L. R. 7 Ex. 332	194
Gordon *v.* Gordon	Mor. Dict. 5902	413
Greig *v.* Edinburgh University	L. R. 1 H. L., Sc. 348	627
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	5

H.

Hall, Ex parte	19 Ch. D. 580	194
Hallett's Case	13 Ch. D. 728	285
Hamilton *v.* Denny	1 Ball. & B. 199	182
Hammerton *v.* Honey	24 W. R. 603	698
Hardy's Patent	6 Moo. P. C. 441	250
Hare *v.* Putney Overseers	7 Q. B. D. 223	628
Harris *v.* Harris	2 Hagg. Cons. 148; 2 Phill. 111	447
——— *v.* Scaramanga	L. R. 7 C. P. 481	374
Harrison *v.* Harrison	L. R. 8 Ch. 346	257
——— *v.* ———	7 Man. & G. 938	668
——— *v.* Southcote	1 Atk. 527	551
Harter *v.* Salford Overseers	34 L. J. (M.C.) 206	628
Hartfort *v.* Jones	1 Ld. Raym. 393	341
Harton *v.* Harton	7 T. R. 652	662
Hawthorne, In re	23 Ch. D. 743	258

		PAGE
Hay *v.* Le Neve	1 S. (2 ed.) 356; 2 Sh. App. 395	98
Henderson *v.* Shankland	[1896] 1 Q. B. 525	377
Henniker *v.* Wigg	4 Q. B. 792	289
Henry Pound, Son and Hutchins, In re	42 Ch. D. 402	579
Hezekiah Baldwin, The Floating Elevator	8 Benedict, 556	342
Hill, Ex parte	23 Ch. D. 695	194
—— *v.* Thomas	[1893] 2 Q. B. 333	634
—— *v.* Tupper	2 H. & C. 121	699
Hirsche *v.* Sims	[1894] A. C. 654	325
Hobbs *v.* London and South Western Railway Company	L. R. 10 Q. B. 111	600
Hodgson *v.* Ambrose	1 Doug. 343	670
Holden *v.* Holden	1 Hagg. Cons. 458	447
Holmes *v.* Holmes	2 Lee, 116	402
Holroyd *v.* Marshall	10 H. L. C. 191	83
Hood Barrs *v.* Cathcart	[1894] 3 Ch. 376	177
Hooper *v.* Keay	1 Q. B. D. 178	289
Horne and Hellard, In re	29 Ch. D. 736	83
Hotson *v.* Browne	9 C. B. (N.S.) 442	540
Hughes *v.* Quentin	8 C. & P. 703	600
Hunnings *v.* Williamson	10 Q. B. D. 459	551
Hutchinson's Trusts, In re	21 Ch. D. 811	686
Hutton *v.* Scarborough Cliff Hotel Company	2 Dr. & Sm. 514, 521; 4 D. J. & S. 672	304

I.

Ilfracombe Public Conveyance Company *v.* London and South Western Railway Company	1 Nev. & Mac. 61	480
Imperial Japanese Government *v.* P. & O. Steam Navigation Company	[1895] A. C. 644	533
Industrie, The	L. R. 3 A. & E. 303	99
Ingham *v.* Primrose	7 C. B. (N.S.) 82	92

J.

Jackson *v.* Turnley	1 Drew. 617	623
Jefferys *v.* Dickson	L. R. 1 Ch. 183	578
Jenkinson, In re	15 Q. B. D. 441	151
Jesson *v.* Wright	2 Bli. 1	667
Johannesburg Hotel Company, In re	[1891] 1 Ch. 119	360
Johnson *v.* Emerson	L. R. 6 Ex. 329	384
——— *v.* Midland Railway Company	4 Ex. 367	481
Jones *v.* Morgan	1 Bro. C. C. 205	670
—— *v.* Taylor	1 E. & E. 20.	494
Julia, The	Lush. 224	99

K.

Keech *v.* Sandford	1 W. & T. 6th ed. 53.	182
Kelly *v.* Kelly	L. R. 2 P. & M. 59	407
Kent's Case	39 Ch. D. 259	360
Keppell *v.* Bailey	2 My. & K. 517	699

		PAGE
Khedive, The	5 App. Cas. 876	391
Kinloch *v.* Secretary of State for India in Council	7 App. Cas. 619	203
Knights *v.* Quarles	2 B. & B. 102	601

L.

Lacey, Ex parte	6 Ves. 625	182
Laidlaw *v.* Lord Advocate	15 App. Cas. 468	14
Lapthorn *v.* Harvey	49 J. P. 709	635
Lee *v.* Lancashire and Yorkshire Railway Company	L. R. 6 Ch. 527	541
Leigh *v.* Jack	5 Ex. D. 264.	512
—— *v.* Shepherd	2 B. & B. 465	182
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	473
Lepine, In re	[1892] 1 Ch. 210	14
Leverington, The	11 P. D. 117	532
Lincoln Corporation *v.* Holmes Common	L. R. 2 Q. B. 482	629
Lindley *v.* Lacey	17 C. B. (N.S.) 578	540
Liverpool Corporation *v.* Wavertree Overseers	2 Ex. D. 55, n.	629
Lloyd *v.* Guibert	L. R. 1 Q. B. 124	100
London Association of Shipowners and Brokers *v.* London and India Docks Joint Committee	[1892] 3 Ch. 242	618
London County Council *v.* Erith Overseers	[1893] A. C. 562	627
Lord Advocate *v.* Galloway	11 R. 541	147
—— *v.* M'Court	20 R. 488	147
Lydney and Wigpool Iron Ore Company *v.* Bird	33 Ch. D. 85	174

M.

Mac, The	7 P. D. 126	339
MacDougall *v.* Gardiner	1 Ch. D. 13	270
Mackenzie *v.* Mackenzie	[1895] A. C. 384	409
McKewan's Case	6 Ch. D. 447	303
M'Leod *v.* Drummond	17 Ves. 169	14
M'Mahon *v.* Burchell	2 Ph. 127	190
Magdalen Hospital *v.* Knotts	4 App. Cas. 324	511
Malpas *v.* London and South Western Railway Company	L. R. 1 C. P. 336	540
Marriott *v.* London and South Western Railway Company	1 C. B. (N.S.) 499; 1 Nev. & Mac. 47	482
Martin *v.* McAlpine	8 Ont. A. R. 675	194
Martin's Divorce Bill	1 H. L. C. 79	473
Martinson *v.* Clowes	21 Ch. D. 857	182
Mavro *v.* Ocean Marine Insurance Company	L. R. 10 C. P. 414; 2 Asp. Mar. Law, 361	376
Maxwell's Case.	L. R. 20 Eq. 585	303
Mellor *v.* Denham	5 Q. B. D. 467	555
Meriden Silver Company *v.* Lee.	2 Ont. R. 451	194
Merriman *v.* Ward	1 J. & H. 371	290
Mersey Docks *v.* Jones	11 H. L. C. 443	626
Mersey Docks Trustees *v.* Gibbs	L. R. 1 H. L. 93	113

		PAGE
Mersey Docks and Harbour Board *v.* Henderson	13 App. Cas. 595	335
Milford *v.* Milford	L. R. 1 P. & M. 295	406
Milner *v.* Milner	31 L. J. (P. & M.) 159; 4 Sw. & Tr. 240	405
Mollwo, March & Co. *v.* Court of Wards	L. R. 4 P. C. 419	578
Molson Bank *v.* Halter	18 S. C. R. 88	194
Montgomery *v.* Montgomery	3 J. & Lat. 47	673
Montgomery Moir of Leckie *v.* Leckie (Lady)	1 Elchies' Dec. H. & W. No. 35, and Vol. ii. p. 193; 6 Pat. App. 687	402
Montreal Assurance Company *v.* McGillivray	13 Moo. P. C. 87	501
Morant *v.* Taylor	1 Ex. D. 188.	559
Morgan's Patent	Webst. Pat. Cas. 737.	250
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	452
Mytton *v.* Mytton	11 P. D. 141	407

N.

Napier's Case	13 Moo. P. C. 543	250
National Debenture and Assets Corporation, In re	[1891] 2 Ch. 505	28
National Dwellings Society *v.* Sykes	[1894] 3 Ch. 159	270
Neeld *v.* Neeld.	4 Hagg. Ecc. 265	404
Newman *v.* Walters	3 B. & P. 612	340
Newman (George) & Co., In re	[1895] 1 Ch. 674	28
Newtownards Gas Company, In re	15 L. R. Ir. 51	304
Nicholson *v.* Chapman	2 H. Bl. 254	341
Night Watch, The	32 L. J. (Adm.) 47	99
Niobe, The	13 P. D. 55	99
Norris *v.* Chambres	29 Beav. 246; 3 D. F. & J. 583	257
North-West Transportation Company *v.* Beatty	12 App. Cas. 589	28
Norton's Patent	1 Moo. P. C. (N.S.) 339	250

O.

Oceano, The	3 P. D. 60	534
Oliver *v.* Oliver	1 Hagg. Cons. 361	403
Ooregum Company *v.* Roper	[1892] A. C. 125	158, 301, 360
Orme *v.* Wright	3 Jur. 19, 972	182
Otway *v.* Otway	2 Phil. Ecc. 95	415
Owen *v.* Cronk	[1895] 1 Q. B. 265	579

P

Painter *v.* Brighton and South Coast Railway Company	1 Nev. & Mac. 58	480
Palmer *v.* Young	1 Vern. 276	182
Parbury's Case.	[1896] 1 Ch. 100	158
Paterson *v.* Paterson	3 H. L. C. 308; 7 Bell's App. 337	402
Paxton *v.* Douglas	19 Ves. 225	551
Perrin *v.* Blake.	1 Coll. Jur. 321	670

		PAGE
Phillips *v.* Naylor	4 H. & N. 565	384
Philpott *v.* Jones	2 A. & E. 41.	289
Pickard *v.* Pickard	33 L. J. (P. & M.) 158	406
——— *v.* Sears	6 A. & E. 469	159
Pioneer, The	30 Fed. Rep. 206	342
Poole *v.* Poole	3 B. & P. 620	675
Popkin *v.* Popkin	1 Hagg. Ecc. 765	402
Portarlington (Lord) *v.* Soulby	3 My. & K. 104	257
Preston *v.* Merceau	2 Wm. Bl. 1249	540
Public Bath No. 13, The	61 Fed. Rep. 692	342

R.

Raft of Spars, (A)	1 Abbott Adm. 291	341
Raft of Timber.	2 Wm. Rob. 251	341
Ranger, The	L. R. 4 P. C. 519	534
Ravenga *v.* Mackintosh.	2 B. & C. 693	385
Redfield *v.* Wickham (Corporation of)	13 App. Cas. 467	256
Redpath *v.* Wigg	L. R. 1 Ex. 335	579
Reg. *v.* Anglesea Justices	65 L. J. (M.C.) 12	559
—— *v.* Arnaud	9 Q. B. 806	28
—— *v.* Burah	3 App. Cas. 889	241
—— *v.* D'Oyly	12 A. & E. 139	270
—— *v.* Edwards	13 Q. B. D. 586	559
—— *v.* Farquhar	L. R. 9 Q. B. 258	560
—— *v.* Glamorganshire Justices	[1892] 1 Q. B. 621	556
—— *v.* Goodall	L. R. 9 Q. B. 557	558
—— *v.* Halliday	21 Ont. App. Rep. 42	233
—— *v.* London Corporation	52 J. P. 70; 57 L. T. 491	559
—— *v.* London Justices	[1895] 1 Q. B. 616	558
—— *v.* Metropolitan Board of Works	L. R. 4 Q. B. 15	628
—— *v.* Prince	L. R. 2 C. C. 154	385
—— *v.* School Board for London	17 Q. B. D. 738	627
—— *v.* Somersetshire Justices	22 Q. B. D. 625	559
—— *v.* Tolson	23 Q. B. D. 168	384
—— *v.* Whitchurch	7 Q. B. D. 534	551
Reilly *v.* Thompson	11 Ir. R. C. L. 238	512
Rex *v.* Downes	3 T. R. 560	562
—— *v.* Lambton	5 Price, 428	91
Rialto, The	15 Fed. Rep. 124	342
Riel *v.* Reg.	10 App. Cas. 678	240
Right *v.* Creber	5 B. & C. 866	673
Rivers (Lord) *v.* Adams	3 Ex. D. 361.	698
Robert Pow, The	32 L. J. (Adm.) 164	99
Roddy *v.* Fitzgerald	6 H. L. C. 875	667
Rogers *v.* Hadley	32 L. J. (Ex.) 241	540
Rooke *v.* Kensington (Lord)	2 K. & J. 753	623
Royal Aquarium Society *v.* Parkinson	[1892] 1 Q. B. 431	71
Royal Mail Company *v.* English Bank of Rio de Janeiro	19 Q. B. D. 362	377
Rushworth's Case	Freem. Ch. 12	182
Rustomjee *v.* Reg.	2 Q. B. D. 69	203
Rutland, The	[1896] P. 195, n. (2)	600

S.

St. Catherine's Milling and Lumber Co. *v.* Reg.	14 App. Cas. 46	203

		PAGE
Salomon *v.* Salomon & Co.	[1897] A. C. 22	578
Sanders *v.* Head	3 Curt. 565	230
Sandys, Ex parte	42 Ch. D. 98	159
Saunders *v.* Saunders	1 Rob. Ecc. 555	418
Sauvageau *v.* Gauthier	L. R. 5 P. C. 494	270
Scholfield *v.* Londesborough (Earl of)	[1896] A. C. 514	92
Schuster *v.* Fletcher	3 Q. B. D. 418	377
Scott *v.* Scott	34 L. J. (P. & M.) 23	420
Sculcoates Union *v.* Hull Dock Company	[1895] A. C. 136	629
Seale *v.* Barter	2 B. & P. 485	680
Severn *v.* Reg.	2 Can. S. C. R. 70	234
Sharp *v.* Wakefield	[1891] A. C. 173	558
Shelley's Case	1 Rep. 93 b	659
Shepherd *v.* Kottgen	2 C. P. D. 578	377
Sherras *v.* De Rutzen	[1895] 1 Q. B. 922	384
Sherry, In re	25 Ch. D. 692	289
Siegert *v.* Findlater	7 Ch. D. 801	717
Simonds *v.* White	2 B. & C. 805	373
Simson *v.* Ingham	2 B. & C. 65	289
Sisters, The	1 P. D. 117	99
Smith, In re	25 Q. B. D. 536	29
——— *v.* Wilson	[1896] A. C. 579	619
Spargo's Case	L. R. 8 Ch. 407	359
Stanmore, The	10 P. D. 134	392
Stephens *v.* McArthur	19 S. C. R. 446	194
Stones *v.* Dowler	29 L. J. (Ex.) 122	540
Stoughton *v.* Reynolds	Fortescue's Rep. 168	270
Strang *v.* Scott	14 App. Cas. 601	376
Suffield *v.* Brown	4 D. J. & S. 185	133

T.

Tailby *v.* Official Receiver	13 App. Cas. 541	84
Tapling *v.* Jones	11 H. L. C. 290	708
Taylor *v.* St. Helens (Corporation of)	6 Ch. D. 273	133
Theta, The	[1894] P. 280	100
Thetis, H.M.S.	3 Hagg. Adm. 48	339
Thurburn *v.* Steward	7 Moore (N.S.) 333	194
Toller *v.* Atwood	15 Q. B. 951	684
Tomkins *v.* Tomkins	1 Sw. & Tr. 172	405
Tottenham *v.* Byrne	12 Ir. C. L. Rep. 376	512
Trevor *v.* Whitworth	12 App. Cas. 409	303
Trowell *v.* Shenton	8 Ch. D. 318	270
Tulk *v.* Moxhay	2 Ph. 774	709

U.

Udell *v.* Atherton	7 H. & N. 172	385
Utopia, The	[1893] A. C. 492	619

V.

Van Horne *v.* Fonda	5 Johns. Ch. (N.Y.) 388	182
Velocity, The	L. R. 3 P. C. 44	534
Vera Cruz, The	9 P. D. 96	100

		PAGE
Virtue *v.* Alloa (Commissioners of Police of)	1 R. 285	113

W.

Walsh *v.* Reg.	[1894] A. C. 144	14
Waring *v.* Waring	2 Hagg. Cons. 153; 2 Phill. 132	418, 447
Waterhouse *v.* Jamieson	L. R. 2 H. L., Sc. 29	159
Waters *v.* Baker	15 Ves. 10	270
Webb *v.* Bird	10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841	698
West Bromwich School Board *v.* West Bromwich Overseers	13 Q. B. D. 929	628
Western Bank of Scotland *v.* Addie	L. R. 1 H. L., Sc. 145	29
Westmeath *v.* Westmeath	2 Hagg. Ecc. Supp. 56	403
Weymouth and Channel Islands Steam Packet Company, In re	[1891] 1 Ch. 66	303
Wheatsheaf, The	2 Asp. (O.S.) 292	99
Wheeldon *v.* Burrows	12 Ch. D. 31	133
Whish *v.* Hesse	3 Hagg. Eccl. 659	227
White's Case	12 Ch. D. 511	360
Whitecross Wire Company *v.* Savill	8 Q. B. D. 653	377
Whitehead *v.* Parks	2 H. & N. 870	132
Wilde *v.* Gibson	1 H. L. C. 605	385
Wilkes *v.* Broadbent	1 Wils. 63	699
Willem III., The	L. R. 3 A. & E. 487	343
Williams *v.* Davies	44 J. P. 347	634
Wilson, Sons & Co. *v.* Currie	[1894] A. C. 116	391
Winter *v.* Perratt	9 Cl. & F. 686	674
Wood *v.* Hamilton	Mor. Dict. 6269; 3 Pat. App. 148	98
Worcester Corporation *v.* Droitwich Assessment Committee	2 Ex. D. 49	629
Wreck Recovery and Salvage Company, In re	15 Ch. D. 353	579

X.

Xenos *v.* Wickham	L. R. 2 H. L. 296	501

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THE ROYAL INSURANCE COMPANY . APPELLANTS; H. L. (E.) 1896 Nov. 12.

AND

WATSON (SURVEYOR OF TAXES) . . . . RESPONDENT.

Revenue—Income Tax—Assessment of Profits or Gains—Deduction—Payment to retiring Manager—"Sum employed as Capital"—Income Tax Act 1842 (5 & 6 *Vict. c.* 35) *s.* 100 *Sched. D Cases* 1 *and* 2 *r.* 1.

Upon the transfer of an insurance business the transferees agreed to take into their service the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables. The transferees retained the manager's services for a short time and then paid him a gross sum in commutation of his salary. They claimed to deduct that sum in estimating their profits for income tax:—

Held, that the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, that the payment was therefore a "sum employed as capital" and could not be deducted.

The decision of the Court of Appeal ([1896] 1 Q. B. 41) affirmed upon the above ground.

CASE stated by Income Tax Commissioners:—

1. At a meeting of the commissioners for the general purposes of the Income Tax Acts for the division of Liverpool, the

H. L. (E.) 1896 ROYAL INSURANCE COMPANY v. WATSON.

Royal Insurance Company appealed against an assessment made upon them under Sched. D of 16 & 17 Vict. c. 34, for the year ending April 5, 1893, and claimed an allowance by way of deduction in respect of a sum of 55,846*l.* 8*s.* 5*d.* paid under the following circumstances:—

2. By the Royal Insurance Company's Act 1891 (54 & 55 Vict. c. lxxxi.), the Royal Insurance Company were invested with powers to acquire the whole of the undertaking of the Queen Insurance Company, and in pursuance of this Act the transfer of the business of the Queen Insurance Company to the Royal Insurance Company took place on August 19, 1891.

3. By art. 6 of the agreement between the two companies embodied in the schedule forming part of the Act, it is provided that "the services of the present manager of the Queen Insurance Company shall be retained by them until the transfer of the business is completed, at a salary at the rate of four thousand pounds per annum, and thereafter he shall be taken into the service of the Royal Insurance Company at the same rate, with liberty nevertheless for the Royal Insurance Company to commute the same by payment to him of a gross sum on the basis of the Queen Insurance Company's annuity tables applicable to his then age, on condition that he shall not at any time accept office or employment of any description under or in connection with any other fire or life insurance company. The remainder of the staff of the Queen Insurance Company shall also be taken over by the Royal Insurance Company."

4. On the transfer of the business the manager of the Queen Insurance Company was taken into the service of the Royal Insurance Company at the salary of 4000*l.* per annum, and shortly afterwards, in pursuance of the powers conferred on them by the 6th article of the agreement, and in accordance with its terms, the Royal Insurance Company paid him the sum of 55,846*l.* 8*s.* 5*d.* in commutation of his annual salary.

5. The Royal Insurance Company contended that in arriving at the amount of their liability for assessment for the year ending April 5, 1893, under the provisions of the Income Tax Acts, the sum of 55,846*l.* 8*s.* 5*d.* was a proper deduction to make from the profits of their business for the year 1891–1892

(the year in which the commuted payment was made), and that if they had elected to continue the annual payment of 4000*l.* that amount would have been charged in their revenue account yearly, and so have reduced the profits assessable for taxation.

6. Mr. Watson, the surveyor of taxes, on behalf of the Crown, contended that the sum of 55,846*l.* 8*s.* 5*d.* could not, from the very nature of the case, be considered an expense necessary to earn the profits of the year against the revenue of which it was sought to be charged; that, being a payment at the option of the Royal Insurance Company, it was in reality part of the consideration paid for the business of the Queen Insurance Company, and was, therefore, properly a charge to capital as an expense of acquiring the undertaking, and not against revenue; that under the agreement the annual payment of 4000*l.* would have been for services rendered and a legitimate charge against profits so long only as the payment lasted, but that the commutation of this annual payment involved the abandonment of all claim to services, and transformed the annual payment into a capital expense, and that, therefore, the deduction of 55,846*l.* 8*s.* 5*d.* from the profits of the year to December 31, 1891, was not admissible in arriving at the liability of the company for assessment under the provisions of the Income Tax Acts.

7. The commissioners were of opinion that the sum of 55,846*l.* 8*s.* 5*d.* was a proper deduction from the profits chargeable to income tax, but at the Crown surveyor's request stated this case.

The question for the opinion of the High Court was whether or not for purposes of assessment to income tax the Royal Insurance Company were entitled to charge against their profits the sum of 55,846*l.* 8*s.* 5*d.* paid by them in 1891–1892 in commutation of the salary of 4000*l.* which would otherwise have been paid annually to the gentleman who was manager of the Queen Insurance Company at the time of the transfer.

The Queen's Bench Division (Vaughan Williams and Wright JJ., the latter dissenting) was of opinion that the case

H. L. (E.) 1896 ROYAL INSURANCE COMPANY v. WATSON.

should be remitted to the commissioners for amendment, in order to ascertain the circumstances under which and the consideration in respect of which the agreement to pay the sum in question to the manager was arrived at. The surveyor having appealed, the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) held that the company were not entitled to make the deduction. (1)

Joseph Walton Q.C. and *W. H. Horsfall* for the appellants. By the Income Tax Act 1842 c. 35 s. 100 Sched. D First Case rule 1, the duty is to be computed on a sum not less than the full amount of the balance of the profits or gains of the trade, &c., upon a fair and just average of three years, and by rule 3, in estimating the balance of profits or gains no deduction is to be allowed (inter alia) "for any sum employed or intended to be employed as capital in such trade," &c. By the first of the rules applying to the First and Second Cases, in estimating the balance of the profits or gains no deduction is to be made (inter alia) "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," &c. The Court of Appeal held that the case came under the latter provision and that the payment to the manager of a lump sum could not be said to be wholly or exclusively laid out for the purposes of the insurance business. But the services of the manager were retained for the benefit of the appellants' business; if he had not been retained they would not have made the profits which were made; his knowledge and experience and business connections were essential to the making of the profits. It is not suggested that it was not a proper and prudent thing to retain the manager and to expend the necessary money in so doing. The sum paid was no doubt large, but so was the business to be acquired and retained. It is admitted by every one, and was not disputed in the Court of Appeal, that the appellants would have been entitled to pay the manager 4000*l.* a year so long as he remained manager and to deduct that sum in estimating the balance of their profits. Such a payment would admittedly have been money "wholly

(1) [1896] 1 Q. B. 41.

and exclusively expended for the purposes" of the business. What difference is there in principle between such a payment and the payment of a lump sum in commutation of the annual liability? A difficulty seems to have been raised in the Court of Appeal on the ground that no deduction can be allowed except for expenditure incurred in producing the profits for the year in question, or for one of the three years upon the average of which the estimate is to be made. But the Income Tax Act does not so enact. This was an expense to earn profit, and it reduced the expenditure for the future. Suppose an action was brought for wrongful dismissal and a verdict went against the company. That would surely be an allowable deduction, for a loss "connected with or arising out of" the trade. The present is an a fortiori case, because the payment was for the manager's services which the appellants desired to and did retain for a certain time.

With regard to the question of capital, the Court of Appeal did not proceed upon that ground and did not hold that the agreement to retain the manager and pay him was part of the consideration for the transfer of the business. That question was distinctly raised in the case stated by the commissioners, and as they decided against the Crown the inference is that they found that fact in favour of the appellants. If indeed the lump sum had been paid down upon the transfer and no services had been rendered by the manager, possibly the amount could not have been deducted, but that is not this case. The manager's services were retained and were rendered for a time, and the agreement contemplates their being rendered for an indefinite time. It is clear that if the appellants had continued to receive his services the payment of the 4000*l.* a year would not have been a "sum employed as capital." The commutation of the annual liability into a lump sum does not make that a capital expenditure which was not so before. What was bought and thus paid for was not the goodwill of the business, but the services of the manager.

[They referred to *Gresham Life Assurance Society* v. *Styles*. (1)]

(1) [1892] A. C. 309.

H. L. (E.)
1896
ROYAL INSURANCE COMPANY v. WATSON.

Sir R. Finlay S.-G. and *Danckwerts* for the respondent were not heard.

LORD HALSBURY L.C. My Lords, I have had some difficulty in dealing with the various grounds on which this case has been debated both in the Court below and in the Court of Appeal; but there is one ground which practically is to my mind only a question of fact, and which, I think, is decisive of the issue in this appeal. With reference to some other questions, which will not be governed by this case, we should, if it had been necessary, have heard the Solicitor-General, and applied our minds to the solution of some of the difficult and intricate problems which are raised by the language of the Income Tax Acts; but confining myself to the one ground, upon which this case, I think, must depend, I entertain no doubt whatever that the judgment of your Lordships ought to be in affirmation of the judgment of the Court of Appeal.

My Lords, whatever else is clear in the Income Tax Acts or obscure, there is no doubt about one particular head of inquiry which is to my mind decisive of this case. It is often a very difficult question to ascertain, in dealing with a commercial account, what is capital and what is income; but if it is established as a fact that the expenditure is capital, the language of the statute itself determines that that expenditure cannot be deducted from the profits, and that the profits are to be ascertained without reference to the capital expenditure. That appears to me to be decisive of this case, because if I look at the whole circumstances of this transaction and observe that the transfer from the one company to the other is to be upon certain terms, which terms are before us upon the agreement sanctioned by the statute, I can entertain no doubt whatever that the money to be paid, which was the consideration for the transfer of the business from the one company to the other, was capital expenditure of the new company which had received the business, the goodwill, the staff, and all other accessories which made it possible to continue the business; and one of the items was the particular matter which arises here. There was a manager, and the object was to have that manager brought

within the new company. It was argued by Mr. Walton himself that it was very important for the new company that the manager should be in communication with the agencies, and should still continue in connection with the business. Then an agreement is made not between the manager and the company. There may have been another agreement, and of course there must have been; but the agreement before us is an agreement between the vendor company and the vendee company, and that agreement places upon the vendee company the obligation of taking this manager upon certain terms.

It is not necessary to go into any other part of the question than this. Other questions undoubtedly would arise; but this is clear: the bargain between the two companies involved a liability which was discharged by the payment of this sum; and as a matter of fact I come to the conclusion that this was a part of the purchase-money, and when I use the compendious phrase "purchase-money," of course I include the arrangement made in respect of shares, because it matters not whether it was paid in money or in money's worth. The result is that one of the companies sells to the other, and part of the consideration which was contemplated by both parties, and in respect of which the bargain was made, and without which it would not have been made, was the manager, and all that was incident to the manager, in respect of the payments to be made to him, whether made at once or made in this form of commutation.

My Lords, under these circumstances, it appears to me that this comes within the express language of the statute; it is capital expenditure—it is part of the purchase-money for the concern. It is perfectly immaterial whether it was entirely so or partly so, because if it was partly so it is enough to establish the proposition which I am maintaining.

My Lords, under these circumstances, it appears to me it is unnecessary and undesirable to go into the other questions raised in this case. That one proposition satisfies me, and I hope will satisfy your Lordships, that this appeal cannot be maintained; and, therefore, I move your Lordships that the appeal be dismissed with costs.

H. L. (E.)
1896
ROYAL INSURANCE COMPANY v. WATSON.

LORD HERSCHELL. My Lords, I am of the same opinion. The question is whether this sum of between 50,000*l.* and 60,000*l.* paid to the former manager of the Queen Insurance Company, who afterwards became manager of the appellant company, can be set against the receipts of the year in which the payment was made for the purpose of arriving at the balance of the profits or gains for that year. I am of opinion that it cannot. I think that when the substance of the transaction is looked at it really was a sum employed as capital in the adventure or concern. The payment was not made merely as the result of a contract of service with the former manager of the Queen Insurance Company. The payment was made in pursuance of a bargain entered into between the Royal Insurance Company and the Queen Insurance Company, which bargain contained the terms on which the Royal Insurance Company was to become possessed of the business of the Queen Insurance Company. Of course, it could not be disputed for a moment that the price paid to a company whose concern was bought by another company would not be expenditure which could be set against the gains of the year in which the payment was made. It would obviously be capital expenditure; and although in this case the payment was a payment to be made under that agreement to the former manager of the Queen Insurance Company, when the matter is looked at in its substance and essence, I do not think that payment differs from such a payment as I have alluded to. I think it was equally a payment made in pursuance of the obligation contained in the contract by which the business of the Queen Insurance Company was purchased, and, therefore, is properly capital expenditure.

My Lords, that is enough for the decision of the case, and I do not intend to express an opinion upon any other point; but in consequence of observations which were made in the Court below, I desire to guard myself upon certain points, and to state that I do not express an opinion upon them, but desire to leave myself perfectly free hereafter if they should arise.

To my mind, the case is not necessarily the same as if this were a payment made to a person employed by the company

for the purpose of determining his service, getting rid of him and substituting somebody else in his place, quite apart from any such agreement as existed in the present case between the Royal Insurance Company and the Queen Insurance Company —a mere part of an arrangement made between the company and one of their employees. In my opinion, this is not such a case. I desire to say nothing to prejudice the decision if such a case should arise.

Again, the view has been expressed that no expenditure can be charged in any year or in any one of the three years the average of which is taken unless that expenditure can be shewn to have been expenditure relating wholly to the earnings made in one of the three years or in each of them. That, again, is a point upon which I desire to leave myself entirely open to act as may seem fit after argument if the question should arise. I base my judgment exclusively upon the point to which I have called attention.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think this payment was a payment on account of capital, and being so it cannot be deducted. I also desire to make the same reservation as my noble and learned friend with regard to the other questions which have been mentioned.

LORD SHAND. My Lords, if this had been a case of a voluntary agreement between the manager of an insurance company and the company for the payment to him of a salary for so many years, to last for a definite time, but with power to the company at any time they might think fit to terminate the service by making the payment at once of a capital sum, I think there would have been much force in the argument that such a payment might properly form a deduction from gross profits in striking the balance liable to income tax; and I should make the same observation as to a case in which there has been wrongful dismissal of a person having an engagement for a term of years, and who succeeds in obtaining damages on that account. But this case seems to me to be entirely different. I agree with your Lordships in thinking that in this question as to income tax the sum which is proposed to be deducted in

H. L. (E.) 1896 ROYAL INSURANCE COMPANY v. WATSON. Lord Shand.

striking the balance of the profits and gains was a payment of capital, and must be debited to capital and not deducted from the income of the year. The Queen Insurance Company in parting with their business stipulated that they should have allocated amongst their shareholders a certain amount of new stock to be created. But they further stipulated that the company purchasing their business should undertake a responsibility, which in the end has resulted in the payment of 55,846*l.* 8*s.* 5*d.* We do not see what the motive was which induced them to make this stipulation. It may be that they were themselves bound to their manager under an agreement lasting for a period of time, and that they desired to get rid of that obligation and have it transferred to the purchasing company. It may be that they were so satisfied with his services that they desired to reward the manager who was leaving their employment. But, however that may be, they did stipulate that there was to be a money advantage given to their manager on leaving their employment. That was, as it seems to me, clearly an obligation undertaken by the Royal Insurance Company to make a payment in consideration of acquiring the business of the Queen Insurance Company. That, my Lords, I think was a payment of capital, and therefore not a proper deduction from profits.

I desire to add, following upon what my noble and learned friend Lord Herschell has said, that for my part I should have very great doubts of the ground of judgment which I see has been stated by several of the learned judges who have already considered this case, founded upon the view that expenditure which is made in one year must, if it is to be deducted for the purposes of income tax, have reference to profits made during that year. I should have very great difficulty indeed in adopting the reasoning on that subject which is to be found in the judgments in the Court below.

On these grounds, my Lords, I am of opinion, with your Lordships, that this judgment should be affirmed.

LORD DAVEY. My Lords, I agree with your Lordships that the payment to the manager which was in question in this

appeal did in fact form part of the consideration for the purchase of the Queen Insurance Company's business and connection, and, that being so, the point is sufficient for the decision of the case. In these circumstances I do not find it necessary to say anything—and I say nothing—upon the other points which have been opened to us, but which have not been fully argued before us.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 12, 1896.

Solicitors for appellants: *G. L. P. Eyre & Co., for Garnett, Tarbet & Co., Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

LORD SUDELEY AND OTHERS. . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL (ON BEHALF OF HER MAJESTY) . . . . . RESPONDENT.

Revenue—Probate Duty—Foreign Mortgage—Local Situation of Asset.

A testator, who died domiciled in England, by his will after bequeathing legacies gave the residue of his real and personal estate to his executors in trust for his wife for life, and by a codicil gave one-fourth of his "said residuary real and personal estate" to his wife absolutely. His will was proved in England by his executors domiciled in England. His estate included mortgages on real property in New Zealand. His wife afterwards died and her will was proved in England. At her death her husband's estate had not been fully administered, the clear residue had not been ascertained, and no appropriation had been made of the New Zealand mortgages or of any securities to particular shares of the ultimate residue:—

Held, that the right of the wife's executors was, not to one-fourth or any part of the mortgages in specie, but to require her husband's executors to administer his personal estate and to receive from them one-fourth part of the clear residue, that this was an English asset of the wife's estate,

H. L. (E.)
1896
LORD SUDELEY v. ATTORNEY-GENERAL.

and that probate duty was therefore payable under her will upon one-fourth part of the value of the New Zealand mortgages.

The decision of the Court of Appeal, [1896] 1 Q. B. 354, affirmed.

THE Hon. Algernon Gray Tollemache by his will, after bequeathing various legacies and annuities, gave all the residue of his real and personal estate to his two executors in trust to pay the income (in the events which happened) to his wife Frances, and after her death he bequeathed one-fourth "of his said residuary real and personal estate" to his brother, and the rest to other persons.

The will authorized and directed the executors and trustees to leave all the testator's residuary personal estate invested as they should find it at the time of his death, unless they should think proper to change any investment, in which case he authorized them to do so, and to invest in certain securities, including real securities in New Zealand. By a codicil he revoked the gift to his brother and gave "the same share of his real and personal estate" to his wife absolutely. The testator died in 1892 domiciled in England, and the will and codicil were proved in England by his executors who were domiciled in England. The testator's estate included mortgages on real estate in New Zealand. His wife died in 1893, and her will was proved in England by her executors, the appellants, two of whom were also her husband's executors. In estimating the probate duty payable upon her one-fourth share of her husband's residuary personal estate, the appellants excluded the value of the New Zealand mortgages, which in all exceeded 440,000*l*. The Attorney-General having filed an information against the appellants claiming that one-fourth of the value of the New Zealand mortgages ought to have been included for probate duty, the appellants in their answers to interrogatories stated that at the time of the wife's death her husband's personal estate had not been fully administered and was in course of administration: that one legacy only given by his will then remained unpaid; that the amount of the clear residue had not been ascertained, but that it had been ascertained that there would be a large residue (excluding the New Zealand mortgages) over and above the debts and legacies, and that that fact

had to the best of their belief been communicated to the wife during her life by her husband's executors; that no appropriation had been made of the New Zealand mortgages, nor of any securities or portions of securities to particular shares of the net ultimate residue.

The Queen's Bench Division (Lord Russell of Killowen C.J. and Charles J.) gave judgment against the contention of the Crown. (1) This decision was reversed by the Court of Appeal (Lopes and Kay L.JJ., Lord Esher M.R. dissenting) who declared that one-fourth part of the value of the New Zealand mortgages, forming part of the husband's residuary personal estate, was liable to probate duty under the Customs and Inland Revenue Act 1881, as part of the estate and effects of the wife, in respect of which probate of her will was granted to the defendants, and ordered them to pay the amount of that duty. (2) The defendants brought the present appeal.

Nov. 12, 13. *Channell Q.C.* and *Farwell Q.C.* (*A. M. Bremner* with them) for the appellants. The question is whether the husband's will gave the wife the right to one-fourth of the proceeds when realized, and nothing more, or gave them an ownership, a right to the mortgages or a share of them. The latter is the sound view. Probate duty is not payable in England unless the property is completely and for all purposes within the jurisdiction. There may be a personal remedy against the husband's executors in England, but the English Courts have no means of affecting foreign assets, and these mortgages are admittedly foreign assets in respect of the husband's estate, being debts payable by a debtor in New Zealand, so that no probate duty is payable upon them under his will. In order to realize the mortgages, or to enforce registration or other dealings with them, recourse must be had to the Courts in New Zealand. It is not the case therefore of a mere personal claim, of a chose in action; it is a right to an undivided fourth part of specific property which is a foreign asset. The husband's will (as altered by the codicil) expressly bequeaths one-fourth share

(1) [1895] 2 Q. B. 526. (2) [1896] 1 Q. B. 354.

H. L. (E.) 1896 LORD SUDELEY v. ATTORNEY-GENERAL.

of "his said residuary real and personal estate" to his wife. This gives the wife one-fourth of the investments of which the residuary estate consisted—that is to say, one-fourth (inter alia) of the New Zealand mortgages. The will also authorizes and directs his executors and trustees to leave all his residuary personal estate invested as they should find it at the time of his death, unless they should think proper to change it. The fair inference (though it is not perfectly clear) from the appellants' answers is that the mortgages had been appropriated to the trust fund created by the testator's will; they were part of the residue, the bequest had in fact become virtually specific. The right of ownership of an undivided share is a right well recognised by law: the difficulties are difficulties of enjoyment; the right remains. The dictum (or authority, as it seems to have been considered in the Court of Appeal) of Sir James Hannen as to the locality of the asset in *In the Goods of Ewing* (1) was founded upon the analogy of partnership, which is not applicable here, and the dictum is not supported by the two cases cited by Sir James Hannen. The same observation applies to *Laidlaw* v. *Lord Advocate*. (2) The husband's executors might have agreed with the wife or with her executors to transfer to her or them (without any express authority in the husband's will) one-fourth part of the mortgages in specie: *In re Lepine*. (3) It is not necessary to wait for the payment of all the debts and legacies: there is a right to the specific mortgages, a trust fund having been practically constituted. Per Lord Eldon in *M'Leod* v. *Drummond*. (4)

[They also referred to *Ewing* v. *Orr Ewing* (5); *Ewing* v. *Orr Ewing* (6); *Walsh* v. *Reg.* (7)]

Sir R. E. Webster A.-G., Sir R. Finlay S.-G. and *Vaughan Hawkins* for the respondent were not heard.

LORD HALSBURY L.C. My Lords, I confess I think the length of this argument has been in a great measure due to the

(1) (1881) 6 P. D. 19, 23.
(2) (1890) 15 App. Cas. 468.
(3) [1892] 1 Ch. 210.
(4) (1810) 17 Ves. at p. 169.
(5) (1883) 9 App. Cas. 34.
(6) (1884) 10 App. Cas. 453.
(7) [1894] A. C. 144.

fallacious use of language as applicable to the rights of these parties. In a certain sense a person may have a claim; a person may be entitled to this, that, and the other; but the whole controversy turns upon the character of the particular thing to which the legatee is entitled. With reference to a great many things, it would be quite true to say that she had an interest in these New Zealand mortgages—that she had a claim on them: in a loose and general way of speaking, nobody would deny that that was a fair statement. But the moment you come to give a definite effect to the particular thing to which she becomes entitled under this will, you must use strict language, and see what it is that the person is entitled to; because upon that in this case depends the solution of the question. It is idle to use such phrases as your Lordships have heard, I think for a very considerable time, that this was what the person was "entitled to"—that she had an "interest" in this estate. All those phrases are perfectly true in a general way of speaking, but are not applicable to the particular discussion before your Lordships, unless you establish as the starting-point the proposition that the thing that the legatee was entitled to was the actual mortgage itself, so that the New Zealand mortgage—the foreign asset—was the thing that was to be administered. When one looks at it accurately, that is an entire mistake. The thing that the legatee was entitled to was one-fourth share of a residuary estate, consisting, it may be, of many things; and I think it was fallacious on the part of Mr. Channell to say that the residue was very nearly ascertained, because the question is not only of amount—although I think that of itself would not be sufficient if it were only of amount—but it is a question of substance as well as a question of amount. It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say "I will have this or that part of the assets." If a trustee is to be the character filled,

H. L. (E.) 1896 LORD SUDELEY v. ATTORNEY-GENERAL. Lord Halsbury L.C.

the cestui que trust has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted. In this case the trustees and executors happen to be the same persons; but I think Mr. Channell made the point clear by adopting the hypothesis that the executors and trustees had been different persons. Until the thing has been ascertained, until the trust fund has been constituted, the thing of which the trustees are the trustees has not been ascertained. Whether you treat them, therefore, as trustees or executors, the same consideration arises.

Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist. The right of the person to bring an action or to insist upon the performance of the trust may be one thing; but I want to know what the thing is, and until I ascertain that, and until the thing comes into existence, it appears to me the question does not arise. Well, if that is right, then the thing that the legatee is entitled to, call it a debt, call it something that must be administered either by trustee or executor, the character of that, the local character, is fixed by the persons, call them debtors or call them trustees, I do not care which. Under these circumstances it appears to me there can be but one answer to the question, and that is that the debtors are here and have to administer here. The fixing of the character of the asset by the presence of the debtor may or may not have been logical, but it is so; and if it is a debt and the debtor is here, that is the character of the asset as fixed by the residence of the debtor, and the asset is English.

It appears to me that that disposes of the whole question; and I believe that the length of the argument—a very ingenious and learned argument, I do not deny—has been produced by alternately using the words "estate" and "interest" some-

times in their legal technical sense and sometimes in their more popular sense, while the whole foundation of the argument is that the New Zealand mortgages are specifically the property of the legatee, which is a proposition which to my mind it is impossible to maintain.

My Lords, I entirely agree with the language used by Lopes and Kay L.JJ. I believe they have put in very terse and accurate language the true situation of this property in respect of its local character as an asset, and I would wish to adopt the language they have used. I accordingly move your Lordships that this appeal be dismissed with costs.

LORD HERSCHELL. My Lords, I am of the same opinion. The appellants, as the executors of Mrs. Tollemache, became entitled on her death to one-fourth part of the clear residue of the estate of her husband. That estate has not been fully administered: one legacy and some debts remain unpaid. The executors, who are the appellants here, have brought in an account of a certain sum of money as being what they are entitled to and bound to pay probate duty upon under the will of which they are executors in respect of the estate of their testatrix. They have taken, as I understand, the whole of the assets of Algernon Tollemache except between 400,000*l.* and 500,000*l.* invested in New Zealand mortgages; they have put on the other side the legacy and debts still remaining unpaid; they have struck a balance between the two, and one-fourth part of that sum is, as they contend, the sum upon which they are bound to pay probate duty. It is contended, on the other hand, on behalf of the Crown, that the amount of these New Zealand mortgages ought to have been one of the items on the asset side of the account, and that, of course, would have increased the sum upon which duty was payable by one-fourth of that amount. The appellants claim to exclude that sum on the ground that they are foreign assets, and that, therefore, no duty is payable in respect of them; and, no doubt, if they can make out that any particular asset which is part of their testatrix's estate is a foreign asset, then in respect of that no duty is payable.

H. L. (E.) 1896 LORD SUDELEY v. ATTORNEY-GENERAL. Lord Herschell.

I agree with my noble and learned friend on the woolsack that the whole fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache, or they as her executors, were entitled to any part of these New Zealand mortgages as an asset—she in her own right, or they as executors of their testatrix. I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. What she had a right to—what they as her executors had a right to—was one-fourth of the clear residue of Mr. Tollemache's estate—that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants. It seems to me, as my noble and learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist; we do not know how much the amount of the debt remaining unpaid was in the present case, and there was only one legacy unpaid. But the argument would be precisely the same if there had been a large amount of debt and many legacies still unpaid, that could not have made any difference in point of legal effect. Well, in that case how would it be possible to say that any one of the residuary legatees could point to any part of the assets of the testator and say, "This is a part of my estate," when it depends entirely on the method of administration by the trustees in what form the residue becoming divisible will exist when the administration is at an end?

My Lords, that really seems to me conclusive against the claim of the appellants. I do not go further than that. It is unnecessary to say what would have been the case if the estate had been administered; but I certainly am very far from thinking, as at present advised, that it would have made any difference, and that even in that case it could have been said that this was a foreign asset as regards the estate of the testatrix whose estate is in question.

But, my Lords, it is said that it was open to the executors of

Algernon Tollemache to make over, if they pleased, to the testatrix or to her executors, in satisfaction of her rights under the residuary clause in her husband's will, these New Zealand mortgages or a portion of them; and for that proposition authority has been cited. My Lords, that authority, so far from telling in favour, seems to me to tell against the argument of the appellants. If it was open to the executors in the course of administration to make over to her these New Zealand mortgages, it was equally open to them to make them over to other legatees and not to her. And if that be the right which an executor possesses, not only to select what assets he shall use for the purpose of paying debts, but also to determine the mode of administration, by an arrangement with the legatees as to what portion of the estate shall go to this or that legatee, it seems to me impossible to say that at the time of the death of the testatrix her executors were in a position to insist that a certain portion of these mortgages, or an interest in an undivided fourth part of these mortgages, was a part of the estate of the testatrix. In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator, Algernon Tollemache. Well, where was that situate? It seems to me that it can only be said to have been situate in this country. Indeed, I do not think it was seriously disputed on the part of the appellants that unless their contention could be made out that there was a right to these particular assets in Mrs. Tollemache or her executors, probate duty is payable upon the whole sum, and the whole of it must be regarded as an asset situate in this country.

For these reasons, my Lords, I think the judgment appealed from must be affirmed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the point is a very short one, and I think the claim of the Crown is very clear. For my part, I am quite content to adopt the judgments of Lopes L.J. and Kay L.J.

H. L. (E.)
1896
LORD SUDELEY v. ATTORNEY-GENERAL.

LORD SHAND. My Lords, I am of the same opinion, and I am satisfied to rest my judgment on the reasons given by the learned judges, Lopes L.J. and Kay L.J.

It is quite clear that the New Zealand mortgages were the property of Mr. Tollemache when he died, and I have seen nothing that occurred after that to make these mortgages the property of his widow. There was no allocation of any kind; and the trust fund was not in a position to be wound up. Even although the legacies and debts had all been paid I should hold the same view. There were a number of persons having right to the residue and interested in its realization. The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mr. Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets. They might have objected to accept the New Zealand mortgages if it had been proposed to allocate these to them as part of the residue, and the other parties interested might also have had valid objections to such an allocation. If Mr. Tollemache's executors had held the entire estate for behoof of his widow the case might have been different, but with other persons interested in an undivided and unrealized residue none of the beneficiaries had in themselves a right of ownership in particular assets of Mr. Tollemache's estate.

LORD DAVEY. My Lords, the principal testator in this case, Algernon Gray Tollemache, died on January 16, 1892. His widow, Mrs. Tollemache, was entitled to a life interest in the entirety of his residuary estate, and was also entitled to one-fourth of the capital—that is to say, Mrs. Tollemache had an immediate title to one-fourth of her husband's residue and a life interest in the other three-fourths. She died a little more than a year after the death of her husband. At the time of the lady's death the testator's personal estate had not been fully administered and was in course of administration, and the amount of the clear residue had not been ascertained. I read

the very clear statement to that effect in the answer of the executors, not forgetting Mr. Channell's statement, which seems to me irrelevant, that the estate had very nearly been administered. In the events which have happened the residuary estate of the original testator is divisible into sixty-four shares, of which the present appellants are entitled to sixteen. What, then, are the rights of the appellants? Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realized, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them. The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions of the estate in satisfaction of any share by any fair agreement between the executors and the residuary legatees, or a scheme of division of that kind might no doubt be made by the executors either with the sanction of the Court, or possibly at their own risk. In this case there has been no election to take the estate or any portion of it in specie, nor has there been any appropriation by the executors; and, indeed, at the time of Mrs. Tollemache's death the time had not arrived for any such election or appropriation. Mr. Channell endeavoured to argue that a trust fund had "practically" (I think that was the expression) been constituted of these Colonial mortgages in Mrs. Tollemache's lifetime, and that she at the time of her death was entitled to an undivided share of that trust fund. It is sufficient answer to that argument to say that (on the statements in the answer) no trust fund had been constituted or could have been constituted until the residue had been ascertained, and it is unnecessary to consider what would have been the case if these mortgages had formed part of a duly constituted trust fund vested in trustees for the lady.

My Lords, I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in or right to claim any part of the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right

H. L. (E.) 1896 LORD SUDELEY v. ATTORNEY-GENERAL.

by an action for the purpose, but had no right virtute officii to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 13, 1896.

Solicitor for appellants: *J. A. Bertram.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 *Nov.* 16.

ARON SALOMON (PAUPER) . . . . . APPELLANT;

AND

A. SALOMON AND COMPANY, LIMITED RESPONDENTS.

BY ORIGINAL APPEAL.

Followed. EBBW VALE U. D. C. *v.* SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY [1951] 2 K. B. 366

AND

A. SALOMON AND COMPANY, LIMITED APPELLANTS;

AND

ARON SALOMON . . . . . RESPONDENT.

BY CROSS APPEAL.

Company—Private Company—One Man Company—Limited Liability—Winding-up—Fraud upon Creditors—Liability to indemnify Company in respect of Debts—Rescission—Companies Act 1862 (25 & 26 *Vict. c.* 89) *ss.* 6, 8, 30, 43.

It is not contrary to the true intent and meaning of the Companies Act 1862 for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited company consisting only of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with.

A trader sold a solvent business to a limited company with a nominal capital of 40,000 shares of 1*l.* each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders.

In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the requirements of the Companies Act 1862 were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors:—

Held, that the proceedings were not contrary to the true intent and meaning of the Companies Act 1862; that the company was duly formed and registered and was not the mere "alias" or agent of or trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that there was no fraud upon creditors or shareholders; and that the company (or the liquidator suing in the name of the company) was not entitled to rescission of the contract for purchase.

The decisions of Vaughan Williams J. and the Court of Appeal ([1895] 2 Ch. 323) reversed.

THE following statement of the facts material to this report is taken from the judgment of Lord Watson:—

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that part payment might be made to him in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any) as might be agreed on, of the provisional agreement of July 20. The memorandum was registered on July 28, 1892; and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon and Company, Limited," with liability limited by shares, and having a nominal capital of 40,000*l.*, divided into 40,000 shares of 1*l.* each. The company adopted

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

the agreement of July 20, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on August 2, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In terms thereof, 100 debentures, for 100*l.* each, were issued to the appellant, who, upon the security of these documents, obtained an advance of 5000*l.* from Edmund Broderip. In February 1893 the original debentures were returned to the company and cancelled; and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at 8 per cent.

In September 1892 the appellant applied for and obtained an allotment of 20,000 shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, 20,001 shares being held by the appellant, and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it.

Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made, and a liquidator appointed, at the instance of unsecured creditors of the company. It has now been ascertained that, if the amount realised from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about 1055*l.*, which is claimed by the appellant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for payment of the unsecured creditors, whose debts amount to 7733*l.* 8*s.* 3*d.*

The liquidator lodged a defence, in name of the company, to the debenture suit, in which he counter-claimed against the appellant (who was made a party to the counter-claim), (1.) to have the agreements of July 20 and August 2, 1892 rescinded,

(2.) to have the debentures already mentioned delivered up and cancelled, (3.) judgment against the appellant for all sums paid by the company to the appellant under these agreements, and (4.) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of 8200*l.*; that the arrangements made by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company was ever appointed, and that in any case such board consisted entirely of the appellant, and there never was an independent board. The action came on for trial on the counter-claim before Vaughan Williams J., when the liquidator was examined as a witness on behalf of the company, whilst evidence was given for the appellant by himself, and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years.

The evidence shews that, before its transfer to the new company, the business had been prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and his family, and to add to his capital. It also shews that at the date of transfer the business was perfectly solvent. The liquidator, whose testimony was chiefly directed toward proving that the price paid by the company was excessive, admitted on cross-examination that the business, when transferred to the company, was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of directors was ever appointed, or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness Emanuel Salomon to a succession of strikes in the boot trade, and there is not a tittle of evidence tending to modify or contradict his statement. It also appears from the evidence that all the members of the company were fully cognisant of the terms of the agreements of July 20 and August 2, 1892, and that they were willing to accept and did accept these terms.

H. L. (E.)
1896
SALOMON
v.
SALOMON
& Co.
SALOMON
& Co.
v.
SALOMON.

At the close of the argument Vaughan Williams J. announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company; and, on the motion of their counsel, he allowed the counter-claim to be amended. In conformity with the suggestion thus made by the Bench, a new and alternative claim was added for a declaration that the company or the liquidator was entitled (1.) to be indemnified by the appellant against the whole of the company's unsecured debts, namely, 7733*l.* 8*s.* 3*d.*; (2.) to judgment against the appellant for that sum; and (3.) to a lien for that amount upon all sums which might be payable to the appellant by the company in respect of his debentures or otherwise until the judgment was satisfied. There were also added averments to the effect that the company was formed by the appellant, and that the debentures for 10,000*l.* were issued in order that he might carry on the business, and take all the profits without risk to himself; and also that the company was the "mere nominee and agent" of the appellant.

Vaughan Williams J. made an order for a declaration in the terms of the new and alternative counter-claim above stated, without making any order on the original counter-claim.

Both parties having appealed, the Court of Appeal (Lindley, Lopes and Kay L.JJ.) being of opinion that the formation of the company, the agreement of August 1892, and the issue of debentures to the appellant pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismissed the appeal with costs, and declined to make any order on the original counter-claim. (1)

Against this order the appellant appealed, and the company brought a cross-appeal against so much of it as declined to make any order upon the original counter-claim. Broderip having been paid off was no party to this appeal or cross-appeal.

(1) Reported as *Broderip* v. *Salomon*, [1895] 2 Ch. 323.

June 15, 22, 29. *Cohen Q.C.* and *Buckley Q.C.* (*McCall Q.C.* and *Muir Mackenzie* with them), for the appellant in the original appeal. The view of Vaughan Williams J. that the company was the mere alias or agent of the appellant so as to make him liable to indemnify the company against creditors, was not adopted by the Court of Appeal, who seem to have considered the company as the appellant's trustee. There is no evidence in favour of either view. The sale of the business was bonâ fide: the business was genuine and solvent, with a substantial surplus. All the circumstances were known to and approved by the shareholders. All the requirements of the Companies Act, 1862, were strictly complied with: the purpose was lawful, the proceedings were regular. How could the registrar refuse to register such a company? What objection is it that the vendor desires to convert his unlimited into a limited liability? That is the prime object of turning a private business into a limited company, practised every day by banks and other great firms. And what difference to creditors could it make whether the debentures were held by the vendor or by strangers? Whoever held them had the preference over creditors—that is the future creditors—all the old creditors having been paid off by the vendor. There was no misrepresentation of fact, and no one was misled: where is "the fraud upon creditors" spoken of in the Court of Appeal? The creditors were under no obligation to trust the company; they might, if they had desired, have found out who held the shares, and in what proportion, and who held the debentures. There is not a word in ss. 6, 8, 30, 43, or any other section of the Companies Act, 1862, forbidding or even pointing against such a company so formed and for such objects. Then, if the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation. The Court of Appeal seem to treat the company sometimes as substantial and sometimes as shadowy (2) (1888) 13 App. Cas. 30 (6) (1 App. Cas. 1 · it must be one or the other, it cannot be both impose conditions not imposed by the Legislature, as that the shareholders must not be related

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

to each other, or that they must hold more than one share each. There is nothing to prevent one shareholder or all the shareholders holding the shares in trust for some one person. What is prohibited is the entry of a trust on the register: s. 30. If all the shares were held in trust that would not make the company a trustee. The authorities relied upon below (which all turn upon some one being deceived or defrauded) do not touch the present case and do not support the judgment below.

[They referred to *Reg.* v. *Arnaud* (1); *In re Ambrose Lake Tin and Copper Mining Co.* (2); *In re British Seamless Paper Box Co.* (3); *Farrar* v. *Farrars, Limited* (4); *North-West Transportation Co.* v. *Beatty* (5); *In re National Debenture and Assets Corporation* (6); *In re George Newman & Co.* (7)]

As to the cross-appeal, there being no fraud, misrepresentation or deceit, not even any failure of consideration, there is no ground for rescission. Moreover, the company's assets having been sold the company is not in a position to ask for it.

Farwell Q.C. and *H. S. Theobald,* for the respondents. The question is one of fact rather than law, and the true inferences from the facts are these: The appellant incorporated the company to carry on his business without risk to himself and at his creditors' expense. The business was decaying when the company was formed, and though carried on as before, nay with more (borrowed) money, it failed very soon after the sale. To get an advantage over creditors the vendor took debentures and concealed the fact from them. The purchase-money was exorbitant, the price dictated solely by the vendor, and there was no independent person acting for the company. Though incorporated under the Acts the company never had an independent existence: it was in fact the appellant under another name; he was the managing director, the other directors being his sons and under his control. The shareholders other than himself were his own family, and his vast preponderance of shares made him absolute master.

(1) (1846) 9 Q. B. 806.
(2) (1880) 14 Ch. D. 390, 394, 398.
(3) (1881) 17 Ch. D. 467, 476, 479.
(4) (1888) 40 Ch. D. 395.
(5) (1[illegible] appeal or cross-ap[illegible]
(6) [illegible]
(7) [1895] 1 Ch. 674, [illegible] [1895] 2 Ch. 323.

He could pass any resolution, and he would receive all the profits—if any. Whether therefore the company is considered as his agent, or his nominee or his trustee, matters little. The business was solely his, conducted solely for him and by him, and the company was a mere sham and fraud, in effect entirely contrary to the intent and meaning of the Companies Act. The liquidator is therefore entitled to counter-claim against him for an indemnity. As to the cross-appeal and the claim for rescission the decision in *Erlanger* v. *New Sombrero Phosphate Co.* (1) and the observations of Lord Cairns are precisely applicable and conclusive in favour of rescission. See also *Adam* v. *Newbigging.* (2)

[LORD WATSON referred to *Western Bank of Scotland* v. *Addie* (3), following *Clarke* v. *Dickson.* (4)]

[They also referred to *Ex parte Cowen* (5) ; *In re Smith.* (6)]

The House took time for consideration.

NOV. 16. LORD HALSBURY L.C. My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all—whether in truth that artificial creation of the Legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not

(1) (1878) 3 App. Cas. 1218, 1236, 1238.
(2) (1888) 13 App. Cas. 308.
(3) (1867) L. R. 1 H. L., Sc. 145.
(4) (1858) E. B. & E. 148.
(5) (1867) L. R. 2 Ch. 563.
(6) (1890) 25 Q. B. D. 536, 541.

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

Lord Halsbury L.C.

be competent to any one—and certainly not to these persons themselves—to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights inter se, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will for the sake of argument assume the proposition that

the Court of Appeal lays down—that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Vaughan Williams J.) held that the business was Mr. Salomon's business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lindley L.J., on the other hand, affirms that there were seven members of the company; but he says it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done.

It is obvious to inquire where is that intention of the Legislature manifested in the statute. Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is, or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven shareholders must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Halsbury L.C.

to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition, it would be pertinent to ask whether two or three, or indeed all seven, may constitute the whole of the shareholders? Whether they must be all independent of each other in the sense of each having an independent beneficial interest? And this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

My Lords, I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes L.J. says: "The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent bonâ fide members with a mind and will of their own, and not the puppets of an individual," are by construction to be read into the Act. Lopes L.J. also said that the company was a mere nominis umbra. Kay L.J. says: "The statutes were intended to allow seven or more persons, bonâ fide associated for the purpose of trade, to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of

enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Vaughan Williams J. appears to me to have disposed of the argument that the company (which for this purpose he assumed to be a legal entity) was defrauded into the purchase of Aron Salomon's business because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger* v. *New Sombrero Phosphate Co.* (1), (I quote the head-note), is that "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here), Vaughan Williams J.'s conclusion seems to me to be inevitable that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company

(1) 3 App. Cas. 1218.

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Halsbury L.C.

has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below; but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case, I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that the cross-appeal be dismissed with costs to the same extent.

LORD WATSON. My Lords, this appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the Courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us. [His Lordship stated the facts above set out.]

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the aver-

ments made on amendment, were meant to convey a charge of fraud; and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The res gestæ which might imply that it was the appellant, and not the company, who actually carried on its business, are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits without any risk beyond loss of the money which he has paid for, or is liable to pay upon his shares; and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish the risk of that loss. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant I cannot gather from the record; and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

No additional proof was led after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of July 20 and August 2, 1892, the memorandum and articles of association, and the minute-book of the company.

On rehearing the case Vaughan Williams J., without disposing of the original claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion; but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and consequently that

H. L. (E.)
1896
SALOMON
v.
SALOMON
& Co.
SALOMON
& Co.
v.
SALOMON.
Lord Watson.

the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an alias for Aron Salomon. On appeal from his decision, the Court of Appeal, consisting of Lindley, Lopes, and Kay L.JJ., made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmance proceeded, as embodied in the order, was: "This Court being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The opinions delivered by the Lords Justices are strictly in keeping with the reasons assigned in their order. Lindley L.J., observing "that the incorporation of the company cannot be disputed," refers to the scheme for the formation of the company, and says (1): "the object of the whole arrangement is to do the very thing which the Legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors."

Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient, before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with Vaughan Williams J. when he says: "I do not think that where you have a private company, and all the shareholders in the company are perfectly cognisant of the conditions under which the company is formed, and the conditions

(1) [1895] 2 Ch. 337, 339.

of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion, because it is not raised by the facts of the case, and, in any view, these considerations are of no relevancy in a question as to rescission between the company and the appellant.

Mr. Farwell argued that the agreement of August 2 ought to be set aside upon the principle followed by this House in *Erlanger* v. *New Sombrero Phosphate Co.* (1) In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the Lord Chancellor (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late after a liquidation order. But in this case the agreement of July 20 was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company. In my opinion, therefore, *Erlanger* v. *New Sombrero Phosphate Co.* (1) has no application, and the original claim of the liquidator is not maintainable.

The Lords Justices of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of 10,000*l.* worth of its debentures to the appellant, were "contrary to the true intent

(1) 3 App. Cas. 1218.

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Watson.

and meaning of the Companies Act, 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley L.J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company.

The provisions of the Act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Sect. 6 provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability; and s. 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, inter alia, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other; and the second

plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication, impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with; and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of July 20; and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed in animo, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant in terms of it, and by his receiving an allotment of shares which increased his interest in the company to $\frac{20001}{20007}$ of its actual capital. I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any one of these things could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company; but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any one of those things, which taken together are said to constitute his fraud, without the consent and privity of the other shareholders. It seems doubtful whether a liquidator as representing and in the name of the company can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Watson.

The memorandum of association gave notice that the main object for which the company was formed was to adopt and carry into effect, with or without modifications, the agreement of July, 1892, in terms of which the debentures for 10,000*l.* were subsequently given to the appellant in part payment of the price. By the articles of association (art. 62 (*e*)) the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, from the company; and it is not alleged or proved that there was any failure to comply with s. 43 or the other clauses (Part III. of the Act) which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion, the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires; and, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both Courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

LORD HERSCHELL. My Lords, by an order of the High Court, which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company was entitled to be indemnified by the appellant against the sum of 7733*l.* 8*s.* 3*d.*, and it was ordered that the respondent company should recover that sum against the appellant.

On July 28, 1892, the respondent company was incorporated with a capital of 40,000*l.* divided into 40,000 shares of 1*l.* each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of July 20, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed, for the acquisition by the company of the business then carried on by the appellant. The company was, in fact, formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid 1*l.* per share out of the purchase-money which by agreement he was to receive for the transfer of his business to the company. The company afterwards became insolvent and went into liquidation.

In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. This counter-claim was not in the pleading as

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Herschell.

originally delivered; it was inserted by way of amendment at the suggestion of Vaughan Williams J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for, and made the order complained of. He was of opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures."

The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and cestui que trust; but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.

It is to be observed that both Courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view

that the company was the agent of Salomon to carry on his business for him. In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company and all that followed on it were a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their cestui que trust. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the Court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

Lord Herschell.

the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company and the transfer to it of the business is, that whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference: the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion, all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable without limit to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the Court below have contemplated the application of their judgment to such cases as I have been considering; but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor

whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with; and this leads naturally to the inquiry, What are those requirements?

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please: the statute prescribes no minimum; and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature, therefore, clearly sanctions a scheme by which all the shares except six are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion, it makes no difference. The statute forbids the entry in the register of any trust; and it certainly

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Herschell.

contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum, or who have agreed to become members of the company and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do: it concerns only them and their cestuis que trust if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part-payment of the purchase-money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance

that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that, at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands, there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought, at all events, to be set aside on the ground of fraud. In my opinion, no such case has been made out, and I do not think the respondent company are entitled to any such relief.

LORD MACNAGHTEN. My Lords, I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and shoe manufacturer trading on his own sole account under the firm of "A. Salomon & Co.," in High Street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital, he had gradually built up a thriving business, and he was undoubtedly in good credit and repute.

It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that if Mr. Salomon had been minded to dispose of his business in the market as a going concern he might fairly have counted upon retiring with at least 10,000*l.* in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Macnaghten.

daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners: they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances. He turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at 40,000*l.* in 40,000 shares of 1*l.* each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorized to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed 10,000*l.* without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public.

The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated August 2, 1892, the company adopted the preliminary contract, and in accord-

ance with it the business was taken over by the company as from June 1, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over 39,000*l.*—a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which at first sight calls for observation; but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase-money was paid in this way: as money came in, sums amounting in all to 30,000*l.* were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of 10,000*l.* was paid in debentures for the like amount. The balance, with the exception of about 1000*l.* which Mr. Salomon seems to have received and retained, went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about 1000*l.* in cash, 10,000*l.* in debentures, and half the nominal capital of the company in fully paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of overvaluation.

The company had a brief career: it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too; and in view of that danger contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could: both he and his wife lent the company money; and then he got his debentures cancelled and reissued to a Mr. Broderip, who advanced him 5000*l.*, which he immediately handed over to the company on loan. The temporary relief only hastened

BIBL.
LOMIN

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

Lord Macnaghten.

ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full; and the unsecured creditors were consequently left out in the cold.

In this state of things the liquidator met Mr. Broderip's claim by a counter-claim, to which he made Mr. Salomon a defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Mr. Salomon of the balance of the purchase-money. In the alternative, he claimed payment of 20,000*l.* on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before Vaughan Williams J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely; but the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon—mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; so the company, he thought, was entitled to indemnity against its principal. The counter-claim was accordingly amended to raise this point; and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or

that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority—no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed; but his appeal was dismissed with costs, though the Appellate Court did not entirely accept the view of the Court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in the order which has been already read.

I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed

H. L. (E.) 1896 SALOMON v. SALOMON & Co. SALOMON & Co. v. SALOMON. Lord Macnaghten.

himself to the full of the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent: it has no sting in it.

In an early case, which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of Giffard L.J. in the Court of Appeal) "went on working the colliery not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability." "It was," adds the Lord Justice, "the policy of the Companies Act to enable this to be done." And so he reversed the decision of Malins V.-C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property: *In re Baglan Hall Colliery Co.* (1)

Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do. Any member of a company, acting in good faith, is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other

(1) L. R. 5 Ch. 346.

subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised 5000*l.* for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon and Company, Limited, may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows the creation of a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up debenture-holders generally step in and sweep off everything; and a great scandal it is.

It has become the fashion to call companies of this class "one man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

Lord Macnaghten.

One argument was addressed to your Lordships which ought perhaps to be noticed, although it was not the ground of decision in either of the Courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an overvalue. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorized to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed, and the counter-claim of the company dismissed with costs, both here and below.

LORD MORRIS. My Lords, I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

LORD DAVEY. My Lords, it is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members the association is not a company formed in compliance with the provisions of the Act and capable of carrying on business with limited liability, either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share

of 1*l.* each, or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share—the provision in s. 8 that no subscriber shall take less than one share, and the provision in s. 30 that no notice of any trust shall be entered on the register. With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think) did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company, i.e., what a jury would say is a substantial interest. In the language of some of the judges in the Court below, any jury, if asked the question, would say the business was Aron Salomon's and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded; and, indeed, it would have been difficult for the learned counsel for the respondents, appearing, as they did, at your Lordships' Bar for the company, who had been permitted to litigate in the Courts below as actors (on their counter-claim), to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the Courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities.

H. L. (E.)
1896
SALOMON
v.
SALOMON
& Co.
SALOMON
& Co.
v.
SALOMON.
Lord Davey.

Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust.

The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an "alias" is usually understood a second name for one individual; but here, as one of your Lordships has already observed, we have, ex hypothesi, a duly formed legal persona, with corporate attributes and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a

nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of cestui que trust and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him here, namely, that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission; and as regards the cash portion of the price, it must be observed that, as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded.

Mr. Farwell relied on some dicta in *Erlanger* v. *New Sombrero Phosphate Co.* (1), a case which is often quoted and not infrequently misunderstood. Of course, Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and

(1) 3 App. Cas. 1218, 1236.

H. L. (E.) 1896

SALOMON v. SALOMON & Co.

SALOMON & Co. v. SALOMON.

Lord Davey.

directors before the shares were offered for subscription; whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding though carried by the votes of that shareholder, was decided in *North-West Transportation Co.* v. *Beatty.* (1)

For these reasons, I am of opinion that the appellant's appeal should be allowed and the cross-appeal should be dismissed. I agree to the proposed order as to costs.

Order of the Court of Appeal reversed and cross-appeal dismissed with costs here and below; the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis; cause remitted to the Chancery Division.

Lords' Journals, November 16, 1896.

Solicitors for appellant: *Ralph Raphael & Co.*
Solicitors for respondents: *S. M. & J. B. Benson.*

(1) 12 App. Cas. 589.

[HOUSE OF LORDS.]

CLARKE . . . . . APPELLANT; H. L. (E.) 1896 Nov. 19.

AND

THE EARL OF DUNRAVEN AND MOUNT-EARL . . . . . RESPONDENT.

THE "SATANITA."

Admiralty—Collision—Damages—Contract overriding Limitation of Liability —Merchant Shipping Act Amendment Act 1862 (25 & 26 *Vict. c.* 63) *s.* 54.

Two yachts were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." One of the yachts in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into and sank the other yacht:—

Held, that there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other, and that upon the true construction of the rules the words "all damages" excluded the operation of s. 54 of the Merchant Shipping Act Amendment Act 1862 which limited the liability to 8*l.* per ton.

The decision of the Court of Appeal ([1895] P. 248) affirmed.

THE Mudhook Yacht Club having advertised a regatta to be neld on the Clyde in July 1894, the appellant entered his yacht the *Satanita*, and the respondent entered his yacht the *Valkyrie*, for a first-class race in the regatta, each owner signing a letter to the secretary of the club undertaking that while sailing under the entry he would obey and be bound by the sailing rules of the Yacht Club Association. Those rules contained a number of regulations to be observed in races, and among them rule 18 which corresponded to art. 14 of the Regulations for Preventing Collisions at Sea. By rule 24, ". . . . If a yacht, in consequence of her neglect of any of these rules, shall foul another yacht, or compel other yachts to foul, she shall forfeit all claim to the prize, and shall pay all damages." By rule 32, "Any yacht disobeying or infringing any of these rules, which shall apply to all yachts whether sailing in the same or different races, shall be disqualified from receiving any prize she would

H. L. (E.) 1896

CLARKE v. EARL OF DUNRAVEN.

THE "SATANITA."

otherwise have won, and her owner shall be liable for all damages arising therefrom."

While sailing under the entry the *Satanita*, without the actual fault or privity of the owner, broke the 18th rule and ran into and sank the *Valkyrie*. The respondent and the master and crew of the latter vessel brought an action in the Admiralty Division against the appellant claiming damages. The appellant paid into court a sum as the amount of damages for which he was answerable under the Merchant Shipping Act Amendment Act 1862 c. 63 s. 54 (1), calculated at the rate of 8*l.* per ton on the registered tonnage of the *Satanita*. Bruce J., before whom the action was tried, held that even if there was a special contract binding the appellant, the words in the rules "all damages" were not so express as to override the statutory limitation. The Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.) reversed this decision, holding that as against the respondent the appellant was not entitled to limit his liability, and condemned him in the damage proceeded for by the respondent and in costs. (2)

The defendant brought the present appeal.

Nov. 13, 16. *Sir R. T. Reid, Q.C.*, and *E. H. Pollard*, for the appellant. By the Merchant Shipping Act Amendment Act 1862 c. 63 s. 54 the owner of any ship—where without his actual fault or privity any loss or damage is by reason of the improper navigation of the ship caused to any other ship, goods or merchandise thereon—shall not be answerable in damages to an aggregate amount exceeding 8*l.* per ton of the faulty ship's registered tonnage. This limitation of liability was well known and long established when these Yacht Sailing Rules were drawn up, and must have been in the contemplation of the persons who drew the rules, as well as of the owners of yachts who race. Agreements as well as statutes are construed with reference to the existing state of the law, and where it is intended to waive a protection of the law very clear and express words must be used to shew the intention. Assuming that

(1) Repealed by the Merchant Shipping Act 1894 c. 60, of which the corresponding section is 503.

(2) [1895] P. 248.

there was a contract between the appellant and respondent and that the contract was broken by the improper navigation of the *Satanita*, the contract must be construed with reference to the statutory limitation of liability, and there being no words shewing clearly an intention to waive the protection, the appellant is entitled to claim it. The words "all damages" mean any damages, all kinds of damages, the word being used in the plural, not in the singular. Liability in full might, it is said, attach in cases where the statute does not apply, for some breach of the sailing rules which does not amount to improper navigation; but a breach of the sailing rules would be evidence of improper navigation, and where the damage happens by "improper navigation" within the meaning of the statute, the operation of the statute is not excluded except by express words. In construing an agreement by which one person undertakes for a money consideration to render services to another, for instance the obligation of a railway carrier, the words are construed most strictly against the contractor, for if he intends to limit his liability he must clearly express the intention. But there is no such principle of construction in a case like the present where each party undertakes similar obligations: the onus is on the person seeking to make out the liability. It is in the highest degree unlikely that owners of yachts would intend to race with unlimited liability. Some of the yachts are of small value and enter for small races, which are sailed at the same time with the largest. Is it likely that the owner of a small yacht would deliberately make himself liable for many thousands of pounds for injuring one of the more valuable yachts or a mark-boat?

Sir Walter Phillimore, *Joseph Walton*, *Q.C.*, and *L. Batten*, for the respondent, were not heard.

Nov. 19. LORD HALSBURY L.C. My Lords, in this case the controversy between the parties appears to me to be reduced to a somewhat narrow point. No doubt there are considerations which apply equally to merchant vessels and to yachts which might have induced the parties to enter into a different contract from that which I think they have entered into. No

H. L. (E.) 1896 CLARKE v. EARL OF DUNRAVEN. THE "SATANITA." Lord Halsbury L.C.

doubt the persons who drew up the terms on which the different competitors were to race were different persons from those who are now litigants at your Lordships' Bar; but I think it cannot be doubted that the substance of it is that the persons who are going to race agree to race upon these terms with each other.

That being so, the whole question turns upon what is the contract. It has been urged upon us that unless the parties used very clear language they must be supposed to be contracting according to the known state of the law with regard to ships coming into collision. I do not deny that considerations of that sort are intelligible and reasonable. On the other hand, I think it cannot be denied that the case of yachts is different from that of merchant vessels. I do not say that such a consideration would be conclusive; but remember that these are competing vessels, and where you are speaking of these first-class yachts competing in a yacht-race you might as well value a race-horse by its weight, so many pounds of flesh, as speak of the value of a yacht according to its tonnage. Of course, it may be said in respect to merchant ships also, that that is a very rough test of the value of the ship, and that the object of it is to limit the risk. That is true also; but the conditions under which merchant ships sail and yachts sail are different. Merchant ships must be on the seas at all times and in all weathers, both by day and by night, and it may well be that the considerations that would induce people, so to say, to diminish the stakes upon which they were running their vessels would not be applicable to the case of yachts, which presumably are intended to race in conditions of light and of weather in which they are not exposed to the same risks.

My Lords, I only put these matters forward as considerations which may be properly urged on both sides; but in truth the whole question must come back to what is the language which the parties have used, and what is the meaning of that language.

Now, apart from any other consideration, looking to the fact that part of the contract is that disobedience of the rules shall make the party who is guilty of the disobedience liable to

damages—"*all* damages"—if I am to assume that the parties must have known what the condition of the law was in reference to ordinary merchant ships, I think the balance is in favour of those who contend that it would have been proper and appropriate, if they had intended to have that limitation of liability, to put some words in the contract to place it beyond doubt. These words are not legal words—they are popular words: you pay "all damages" if you disobey the rules. I cannot help thinking, therefore, that the true intention of the parties (which, after all, is the thing we have to look at) is to be found in the language they have used; and, having regard to the considerations I have referred to, it appears to me that the word "all" has no significance at all unless it is intended to be used in its popular and natural meaning, and that the expression that they are to pay "all damages" does not mean damages as limited by the Merchant Shipping Act. If I am to look at the language of the contract—though I do not say it is one of those cases which you can pronounce to be absolutely clear (I can quite understand a different view being taken for the reasons I have pointed out)—to my mind the intention of the contract is that the parties are not to be bound by the limitation of the Merchant Shipping Act, but that all damages are to be paid by the person disobeying the rules.

Under these circumstances, my Lords, I do not see my way to disagreeing with the judgment of the Court of Appeal; and I therefore move your Lordships that this appeal be dismissed with costs.

LORD HERSCHELL. My Lords, I am of the same opinion. I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability. That being so, the parties must be taken to have contracted that a breach of any of these rules would render the party guilty of that breach liable, in the language of rule 24, to

H. L. (E.) 1896 CLARKE v. EARL OF DUNRAVEN. THE "SATANITA." Lord Herschell.

"pay all damages," in the language of rule 32, to be "liable for all damages arising therefrom." The language is somewhat different in the two rules; but I do not think they were intended to have, with regard to payment or liability to damages, any different effect. It is admitted that the appellant broke one of those rules, and, having broken or disobeyed that rule, it is quite clear, on the assumption of a contract such as I have described, that there arose the liability to "pay all damages," or "to be liable for all damages arising therefrom."

But then it is said that under the Merchant Shipping Act, if one vessel is injured by the negligent navigation of another, the vessel that does the injury is only liable to the extent of 8*l.* per ton unless there has been default on the part of the owner, and that the liability under these rules must be limited in the same way and to the same extent. My Lords, it is to be observed that the liability created by the contract is not a liability which exists at common law. It is a breach of any of the rules that is made the foundation of the liability. The common law creates liability in the case either of navigation which is negligent at common law, or navigation which is to be deemed negligent as being a breach of a statutory rule. That being so, it seems to me at the outset very seriously open to doubt whether it is possible to contend that a limitation of the common law liability in a particular case, namely, the negligent navigation without default of the owner, is applicable at all to a liability which is created by contract between the parties in a given event, which event is not that upon which the limitation is imposed by the words of the statute. It was ingeniously argued by Sir Robert Reid that a breach of these sailing rules would be an element in considering whether there had been negligence at common law, and I should not be disposed for a moment to dispute that there are circumstances under which that might be the case; but, after all, it would not be necessary in order to establish a liability under these rules to enter into any such question at all. Proof of breach of the rule would be enough to prove liability. My Lords, I am not satisfied that there are no cases in which a liability would not arise under these rules where there would be no liability at common law. If that be

so, it seems to me that the contention of the appellant would have a very strange result. A breach of the rule proved—primâ facie liability—then the party who admits the breach of the rule says, "But I propose now to ask you to enter upon the inquiry whether there was negligent navigation, because if I can succeed in shewing that my yacht was negligently navigated I shall cut down the liability which otherwise there would be nothing to restrict." My Lords, that seems to me in itself a cogent consideration when one is inquiring whether these words "all damages" can be cut down in the manner contended for on the part of the appellant. I do not see my way to put a restriction upon words which primâ facie do not import any restriction, and which have no necessary reference to the provisions of the Merchant Shipping Act creating limited liability, inasmuch as the liability of the person who enters into this contract is not made to depend upon the circumstances in respect of which a limit is imposed by the Merchant Shipping Act.

My Lords, it has been said that a contract such as the Court below have held to exist is a very unlikely contract for the parties to have entered into. I confess I am not satisfied of that either. The parties here are yacht-owners who are entering their yachts for a race in which other yachts will be engaged. I do not think there is anything extraordinary in their entering for that race upon the terms that they shall be liable for all damage, because the contract gives of course the correlative right of being entitled to all damage. The question to whom that contract would be an advantage would depend on the size of the injured vessel and the injuring vessel in the particular case, which could not be foreseen; therefore it does not seem to me extraordinary that a contract of this sort should be entered into. And again, whilst it is a most uncommon thing for merchant vessels engaged in an adventure to be actually navigated by the owner, that is not at all an uncommon thing in the case of yachts. Of course, if the yacht were navigated by the owner and there were negligent navigation, he would be liable for all damages; and that may have been a consideration which led to a contract of this description being made a condition of yachts entering for the race. It puts upon a level,

H. L. (E.) 1896 CLARKE v. EARL OF DUNRAVEN. THE "SATANITA." Lord Herschell.

upon an equality as regards liability to one another, a yacht which is being navigated by the owner and a yacht which is being navigated by some other person on his behalf or employed by him. Therefore, there seems to me to be nothing monstrous, nothing absurd, in the contract which has been held to exist by the Court below, which would justify this House, or any tribunal, in saying that the parties never could have intended to enter into a contract of this description, and that it must have some other interpretation. My Lords, I go no further than that—I do not know whether that was the reason —I do not care whether that was the reason why the provision in question was inserted; but when you seek to cut down what is the primâ facie meaning of a contract, and to impose a limitation upon the general words which are used in it, if you seek to do so by considerations such as those which have been urged upon your Lordships with great force by the learned counsel for the appellant, then you must make it manifest that it is a contract which there could be no reasonable ground for the parties to have entered into.

My Lords, there is one other consideration which weighs with me also. Amongst these sailing rules there are rules which are a mere repetition of the ordinary navigation rules. Now, it is very difficult to understand what effect the insertion of these particular rules would have unless it be to make a breach of them result in a liability to pay all damages. They exist, and they would have applied, as being amongst the ordinary rules of navigation, whether they had been among these sailing rules or not, unless they were excluded by agreement between the parties. The parties have chosen for some reason or other to insert these among the sailing rules by which they have become contractually bound, and from a breach of which this liability was to arise. I am not sure that I have heard any reason for their insertion unless it be this, that they become then not only the ordinary sailing rules, but part of a contract a breach of which creates a liability to pay "all damages," to which the statute does not extend.

My Lords, whether all the results of these rules have been contemplated may be a question. It may be that when they

are scrutinised in the light of the occurrence that took place here, it may be thought desirable, or necessary, to make alterations in them—with that your Lordships have nothing to do—your only function is to construe the rules as they stand; and so construing them I find myself quite unable to differ from the judgment of the Court below.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

I do not think that the appellant can avail himself of the limitation of liability prescribed by the Merchant Shipping Act. It seems to me that the expression "all damages arising therefrom" means what it says, and that the generality of this expression is not to be cut down or restricted by anything outside the rules.

The learned counsel for the appellant do not, I think, get rid of the difficulty (if there be any difficulty), or advance their argument in the least, by translating the word "all" into the word "any," as they proposed to do. They have still to qualify the expression "any damages" by the words "recoverable by law."

I do not see why the language which the framers of the rules have adopted should be changed, or why the language, as we find it, should not have its full and ordinary signification. It does not lead to any absurd or unreasonable result. In fact, as the learned judges of the Court of Appeal point out, when you consider the conditions of amateur racing and the qualifications, or possibly in some cases the want of qualification, of the helmsman, the result according to the respondent's construction of the rule is only what one would suppose must have been intended. On the other hand, if the appellant's view is adopted, you have this consequence—anomalous certainly, if not unreasonable—that the yachtsman's liability is limited if he breaks both the sailing rules and the statutory rules of navigation; if he only breaks the sailing rules, his liability is unlimited: the minor offence carries the heavier penalty. There is less danger in transgressing the law than in departing from the rules of the game. The suggestion that every breach of the rules is improper navigation so as to attract

H. L. (E.) 1896 CLARKE v. EARL OF DUNRAVEN. THE "SATANITA."

the statutory limitation of liability is more ingenious, I think, than sound.

I agree that the appeal must be dismissed.

LORD SHAND. My Lords, I concur.

LORD DAVEY. My Lords, I concur, and I have nothing to add to the reasons which have been given.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 19, 1896.

Solicitors for appellant: *Thomas Cooper & Co.*
Solicitors for respondent: *Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 Dec. 8.

LORD WILLIAM NEVILL . . . . APPELLANT;

AND

THE FINE ART AND GENERAL INSURANCE COMPANY, LIMITED . } RESPONDENTS.

Defamation—Libel—Privileged Occasion—Excess of Privilege—Malice.

The appellant acted for some time as agent to an insurance company at his own offices. After some correspondence as to a change of terms upon which the parties could not agree, the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his offices had "been closed by the directors." The appellant having brought an action for libel against the company the judge ruled that the statement was capable of a defamatory meaning but that the occasion was privileged. The jury found a verdict for the plaintiff, that the statement was a libel, that it was untrue, and that the defendants had exceeded the privilege, but did not find actual malice:—

Held, that judgment must be for the company, on the grounds that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, and that there was no evidence of malice for the jury.

The decision of the Court of Appeal ([1895] 2 Q. B. 156) affirmed.

IN 1892 the appellant became agent to the respondents, and conducted the agency at his own offices, 27, Charles Street,

St. James'. After some months the appellant told the respondents that he desired better terms, and a correspondence passed between them on the subject. In December 1893 the respondents' secretary wrote to the appellant that the board had come to the decision to terminate the agreement with him. An alteration of the terms was made and the appellant continued to act at his offices as agent for the respondents, and a correspondence ensued as to terms for the future. On March 13 1894, in answer to a question as to the appellant's intentions, his solicitor wrote to the respondents' secretary that the appellant wished to sever all connection with the company, as he did not consider the terms they had offered would justify him in continuing. On March 15 the following circular was sent by the respondents' secretary to certain persons who transacted insurance business with the company through the appellant's office :—

"28 Cornhill, London,
"15th March, 1894.

"Dear

"In forwarding the enclosed renewal notice, I beg to inform you that the West End office of this Company has been opened at 19 St. James' Street, S.W., under Mr. Murray Faulkner.

"The agency of Lord William Nevill at 27 Charles Street, St. James' Square, has been closed by the Directors. I shall therefore be obliged if you will kindly direct all communications to our West End Secretary at 19 Saint James' Street, and I shall at all times be pleased to afford you any assistance in all matters relating to insurance against fire, burglary, accident, employers' liability and all risk.

"Yours faithfully,
(Sd.) Claude G. Hay, Secretary."

The clerk who drafted the circular was called as a witness at the trial and testified that his first draft stated that the appellant had resigned his agency to the company, that the secretary was displeased with those words and told him to prepare another draft stating that the directors had closed the agency, the secretary saying that his object was to induce the appellant's

H. L. (E.) 1896 NEVILL v. FINE ART AND GENERAL INSURANCE COMPANY.

clients who had hitherto insured through him to continue insuring directly with the company.

The appellant brought an action of libel against the respondents upon the circular, alleging in the statement of claim that the statement about the agency was untrue; and (alternatively) alleging that the statement meant that the appellant had been dismissed by the respondents from his employment as their agent for some reason discreditable to him.

Pollock B., before whom the action was tried, ruled that the circular coupled with the circumstances under which it was published was capable of a defamatory meaning, but that the occasion was privileged, and asked the jury—(1.) whether it was a libel; (2.) whether the respondents published it falsely and maliciously; (3.) whether the words meant that the appellant had been dismissed for some reason discreditable to him. The jury found that it was a libel and assessed the damages at 100*l.*, but could not agree as to the second and third questions. In answer to further questions by the learned Baron, the jury found—(1.) that the statement made by the respondents that "the agency of Lord William Nevill has been closed by the directors" was not true; (2.) that in making that statement the respondents had exceeded the privileged occasion which entitled them to give a notice with regard to the agency being at an end. On further consideration Pollock B. entered judgment for the plaintiff for 100*l.* The Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.) set aside the verdict and judgment and entered judgment for the defendants. (1) The plaintiff brought this appeal.

Asquith Q.C. and *A. H. Poyser* for the appellant. The statement in the circular that the appellant's agency had been closed by the directors was capable of a defamatory meaning, and might be so construed by reasonable persons: it would probably be so interpreted by the persons to whom the circular was sent. It was therefore for the jury to say whether under all the circumstances it was a libel. The jury found that it was, and moreover that it was untrue. *Capital and Counties Bank* v. *Henty* (2)

(1) [1895] 2 Q. B. 156. (2) (1882) 7 App. Cas. 741.

is relied on as an authority that the statement was not libellous, but there the statement was absolutely true; here it was not. The statement could not possibly refer to the change of terms and what took place in December 1893; it must have been intended to lead people to suppose that the directors had just closed the special agency which had existed since December 1893, whereas that agency was in fact closed by the appellant's resignation. The judge having ruled that the occasion was privileged it was for the jury to say whether the publication was made in the exercise of the privilege. It is not necessary for the jury to find express malice, or whether malice was shewn by the defendant's exceeding the privilege: it is enough if the jury find that the communication did exceed the privilege. And the evidence of the excess may be extrinsic or intrinsic. Here there was both, from the wording of the circular and also from the evidence of the clerk who drafted it. The law on this subject is well expressed in a considered judgment of the Queen's Bench delivered by Lord Campbell C.J. in *Cooke* v. *Wildes*. (1) It has no doubt been said that in order to get rid of the defence of privilege actual or express malice must be shewn; but the more accurate expression is the one which Lord Blackburn in *Capital and Counties Bank* v. *Henty* (2) said he preferred, namely, that the defendant is not answerable so long as he is acting in compliance with the duty or exercising the right; otherwise he is answerable. Again in *Royal Aquarium &c. Society* v. *Parkinson* (3) Lord Esher M.R. said the question was whether the defendant was using the occasion honestly or abusing it, not whether he was acting bonâ fide or maliciously. But if it be necessary to shew malice, the finding of the jury that the privilege was exceeded is itself evidence of malice. If any further finding by the jury be necessary there ought at least to be a new trial.

Sir E. Clarke Q.C., *J. E. Bankes* and *Marriott* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, in this case I think your Lordships will not desire to hear counsel on the other

(1) (1855) 5 E. & B. 328. (2) 7 App. Cas. 741, 787.
(3) [1892] 1 Q. B. 431, 443.

H. L. (E.)
1896
NEVILL
v.
FINE ART AND GENERAL INSURANCE COMPANY.
Lord Halsbury L.C.

side. I am of opinion that this appeal must be dismissed; and I am somewhat embarrassed, to say the truth, by the multitude of reasons which appear to me to render success on the part of the plaintiff hopeless.

I am of opinion, in the first place, that there was no libel at all; and I confess, had I been the judge trying this cause, I should, at the end of the plaintiff's case, have non-suited him without the smallest hesitation or doubt on the ground that there was no case to go to the jury.

My Lords, the question of whether there is or is not a libellous publication is in the first instance for the judge. Though Fox's Act, of course, only applied to criminal cases, undoubtedly it has been since the passing of that Act assumed that the question of libel or no libel is for the jury and not for the judge, but subject always to this, that the matter which is charged as libellous shall be capable of being and apparently is libellous, calculated to bring the person into hatred, contempt or ridicule, or to cause him some damage.

Now, my Lords, I confess I have listened with all the attention which it deserved to the argument which has been presented to us to-day, and I am unable now to know what is the sense in which any ordinary reasonable man would understand the words of this communication so as to expose the plaintiff to hatred, or contempt or ridicule. In saying that, of course, it is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made. The language is this: [His Lordship read it.]

My Lords, I think it is desirable that the whole letter should be read together—it is a business communication for a business purpose. The West End agency having been at one place, a business communication is made to a person who has an interest in knowing where the communications are to be addressed, and the new office is pointed out, and this passage occurs in the letter: "The agency of Lord William Nevill, at 27, Charles Street, St. James' Square, has been closed by the directors." I am myself wholly unable to understand how any ordinary reasonable man could have construed that one sentence in a

business letter as being the smallest reflection on Lord William Nevill's capacity as a business man, or upon his honour, or how it could in any respect expose him to hatred, contempt or ridicule.

I think this is far within the case of Henty, because as it appears to me two propositions have been established now upon authority which it is difficult to question: first of all, that it is not enough to say that by some person or another the words *might* be understood in a defamatory sense. In the original argument of *Henty's Case* (1) in the Court of Appeal, I observe that Brett L.J., as he then was, says this: "It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. Therefore I am of opinion that this document could not reasonably be taken in a defamatory sense by those to whom it was published according to the primary meaning of the language used in it." And in this House Lord Watson affirmed the same proposition in language to which I think my noble and learned friend, Lord Shand, has already called attention. It would not be enough, therefore, in this case to say that some persons might have understood these words as conveying some reflection upon the honour or business capacity of Lord William Nevill. It stands, therefore, as it appears to me, a long way distant from what was done in *Henty's Case* (2), where a communication was made to the persons who had to make payments to the brewer in the particular case, and they were informed that the cheques of such and such a bank were not to be received in future. That undoubtedly, as Lord Watson points out, might possibly by some persons have been understood to convey some reflection upon the solvency of the particular bank upon which the cheques were drawn, but because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous.

My Lords, under those circumstances, as I have already said, if I had been the judge, I should without hesitation have

(1) 5 C. P. D. at p. 541. (2) 7 App. Cas. 741.

H. L. (E.) 1896 NEVILL v. FINE ART AND GENERAL INSURANCE COMPANY. Lord Halsbury L.C.

withdrawn the case from the jury; and if I had been sitting in a court of review under our old system of pleading, as little should I have hesitated to arrest judgment upon the ground that there was no libellous matter disclosed on the face of the declaration.

My Lords, as I have said, I am overwhelmed by the number of answers that can be made in this case. The sole ground on which the particular phrase in question is cavilled at is that the language of it, when it is noted what the real facts are, suggests what is untrue. Now, in the first place, I am of opinion that it was true; and if I think it was true, when I read the whole correspondence and see what the facts were, I hope it may be imputed to the gentleman who wrote it that he, at all events, might have been under the impression that it was true, because he had only the same means of judging of its truth that I have, namely, the facts. Now, the fact was that the agency was closed by the directors. It is true that the agency in one sense, and in a different sense from that in which I think the writer used the language, was continued during the period elapsing between the month of December and the month of March. There were negotiations going on during that time in which it was discussed between the company on one side, and the plaintiff on the other side, whether or not an agency of a different character should be carried on; but the one agency had been closed, and as I understand the facts, and no attempt has been made to displace them, it was acquiesced in that that form of agency should be finally closed, and the negotiation which proceeded was as to the form in which a personal agency, so to speak, as distinguished from the agency which was established at the branch office at that place, should be continued. It is also true that during those negotiations, in the period which elapsed between December and March, Lord William Nevill was permitted to go on acting as agent for the company, and, as I understand the facts, acting as agent for the company in the new capacity, because if that were not the fact, I do not understand upon what ground he could possibly have accepted the 150*l.* which was given to him, and which he duly acknowledges in part of the correspondence. Therefore

it appears to me that the very groundwork upon which the appellant's argument before your Lordships has been based fails him. I think the statement was true; and if the statement was true, of course that groundwork is displaced.

But suppose it was not true, suppose it was not accurate in the sense in which people would have understood it,—I am obliged to suppose a person of a very extraordinary mind looking at this document such as it is for him to have misunderstood it,—but suppose he did—suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that that would be evidence of malice, which under the circumstances it would be obviously necessary for the plaintiff to prove in order to recover. I say obviously for this reason: I do not think any one has contended before your Lordships that the occasion was not privileged. What has been contended is that the occasion was abused. If what I have stated is true, there is no ground for saying that there was any attempt to do anything else than to make a business communication to persons who had the right to receive these communications, the secretary on the one side, and the insurers on the other, having a common interest in respect of which it was right that these communications should be made.

My Lords, I am therefore of opinion, upon these grounds, that it is impossible to say that there is any evidence here which gives the smallest ground for a jury to find that this was malicious.

My Lords, I do not want to proceed to other grounds which might give rise to the suggestion that what I have been saying is obiter; there are so many grounds upon which one feels that this appeal cannot succeed that one is embarrassed in placing reliance particularly on one, but I have no hesitation in saying that there was no verdict here which would justify the entering of judgment for the plaintiff. The question whether or not this was a privileged communication as apart from the question of whether it was a privileged occasion (I

H. L. (E.)
1896
NEVILL
v.
FINE ART AND GENERAL INSURANCE COMPANY.
Lord Halsbury L.C.

will now take the distinction which has been earnestly pressed upon your Lordships) has not been determined by the jury. That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordships' competence to give him; but what puts him out of court in that respect is this, that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect. I am not imputing neglect or want of astuteness to those who conducted the plaintiff's case—on the contrary, I think they were very alert and astute in what they did—because obviously if that question had been put to the jury the jury would have negatived malice, and therefore they thought they had got enough in the words which the jury used. But, my Lords, it is manifest that that was insufficient. No one could rely upon the verdict which the jury actually did find as shewing that they found such malice on the part of the persons who indited the letter, or on whose behalf it was indited, as would justify a judgment for the plaintiff.

On these grounds it appears to me impossible to maintain that the appellant here could succeed. For myself, I may perhaps regret that the Court of Appeal did not take the view which I think Rigby L.J. did, because I think it is important that parties should know that there is still one question for the Court apart from the question of malice, namely, whether the words are susceptible in point of law of being a libellous communication. If it were otherwise, the jurisdiction over and over again exercised by the Courts in arresting judgment even after a verdict in respect of libels could not have existed. If it is said that because it is suggested that it may be libellous it must go to the jury, I entirely differ from that view; the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as

to make some imputation upon the person complaining. For these reasons, my Lords, I am of opinion that this appeal must be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I am unable to see anything libellous in the circular of March 15 when it is fairly read, having regard to the purpose for which it was written. I should also be very sorry to say that there was anything in that letter which was untrue. I do not think the statement was complete; but if it had been complete I do not think it would have made any difference. The statement would have been complete if it had said that the directors in December had resolved to close this agency, that negotiations had since been continued which were unsatisfactory, and that Lord William Nevill had written to say that he desired to sever his connection with the company. From a statement of that sort, if it had been reasonable to expect so full a statement in the letter, I think exactly the same inference might have been drawn. Of course, when people in business sever their connection, it is very easy to suggest that there is some fault on the one side or the other; but I do not think any reasonable person reading this letter fairly would come to the conclusion that the directors had closed the agency for any cause discreditable to Lord William Nevill.

I also think, agreeing with the Court of Appeal to this extent, that there was no evidence of malice. The jury were asked whether the statement was malicious, and they declined to say that it was, or, at any rate, they could not agree to say so.

My Lords, for the reasons the Lord Chancellor has given, I do not think the appellant is entitled to a new trial, and, on these grounds, agreeing with the reasons which have been already given, I am of opinion that the appeal ought to be dismissed.

LORD SHAND. My Lords, I also am of opinion that the appeal should be disallowed for the reasons which have been already so fully stated.

H. L. (E.)
1896
NEVILL
v.
FINE ART AND GENERAL INSURANCE COMPANY.
Lord Shand.

It appears to me that the document which is founded on as libellous, read in the light of the few surrounding facts which were before the jury, was not of such a character that the judge presiding at the trial should have left it to the jury to say whether it was a libel or not. In the statement of claim, and in the argument which has been submitted by the appellant's counsel, a few words have been taken from the letter of the respondents' secretary of March 15, 1894, as warranting the contention that the letter was libellous. The words, namely, "The agency of Lord William Nevill, at 27, Charles Street, St. James' Square, has been closed by the directors." But we must take the document as a whole; and if we take it with the opening passage, it appears to me that these words are not calculated to convey or to suggest any imputation against the plaintiff. In the first paragraph there is a notice given to those transacting business with the company that the West End office of the company has been opened at 19, St. James' Street—that is to say, that the company, which had no such office previously, has now got an office of its own in that district under Mr. Murray Faulkner. What follows, namely, that the agency of Lord William Nevill has been closed by the directors, is a statement of the natural sequence of the establishment of this new office. Certainly you cannot extract from those words the meaning, directly, that there is any imputation made against Lord William Nevill. It is said that an imputation may be inferred; but that inference certainly is not a necessary inference, and, as it appears to me, it is neither a natural nor a reasonable inference to draw from the words, in the circumstances in which we find them.

The case, therefore, appears to me to be one in which the case of Henty, decided in this House, is absolutely decisive. In *Henty's Case* (1) the language used in reference to the Capital and Counties Bank, whose cheques it was said were to be no longer received, was of a character much more suggestive of an imputation against the soundness of the bank than anything can be represented to be in the language here used as applicable to Lord William Nevill. In the statement of claim there was

(1) 7 App. Cas. 741.

no averment of extrinsic facts known to those receiving the circular which would shew that the language was fitted to convey to them any secondary meaning injurious to the appellant, and no evidence of such facts, no evidence of circumstances calculated to give the words used a more extended sense than their natural meaning, was presented at the trial. I am of opinion, therefore, with your Lordships, that the letter complained of was not a libel, and should not have been allowed to go to the jury as such.

For the reasons which have been given by your Lordships, I am further of opinion that the statements in the letter were true, and were certainly made by the secretary in the belief that they were true. The writer obviously had in his mind, not the correspondence which had taken place immediately before with reference to the new arrangement as to the commissions to be allowed to the appellant on business brought by him after the company should have opened their own West End office, but what had occurred with reference to the permanent and important position of agent which the appellant had held at "the agency at 27, Charles Street," when he was transacting really the West End agency business; and in that view the writer of the letter was correct in saying that the agency had been closed by the directors, for it was they who had terminated the permanent agency, though there had been a temporary and more limited and different agency or arrangement for payment of commissions for a later period.

My Lords, I must say I am further very clearly of opinion that the occasion on which the letter complained of was issued having been admittedly privileged (for there is no question raised as to this) there was no evidence presented to the jury that would establish a case of malice. The jury themselves have not given a verdict of malice, which would be necessary to displace the privilege. It is true that something else was put to the jury by the learned judge, namely, the question whether the jury thought that the defendants "exceeded the occasion of privilege." The words "exceeded the occasion," ambiguous as these words seem to me, having been used, the jury no doubt found that the "privilege had been exceeded," or to put it

H. L. (E.) 1896 NEVILL v. FINE ART AND GENERAL INSURANCE COMPANY. Lord Shand.

otherwise, that there had been what they called "sharp practice." I do not think a finding of that kind is enough to entitle the plaintiff to a verdict for damages for libel. The jury shrank from saying there was malice—they declined to say there was malice; they were then asked the question whether there was something short of malice on the part of the respondents, and they said there was. They were not asked whether that excess of privilege was such as to amount to malice. The learned judge was not asked to put this question by the plaintiff's counsel—I suppose for the obvious reason that the jury had already indicated that they would not answer it in the affirmative. As they were not asked that, it appears to me not only that the verdict which the plaintiff did get did not entitle him to have judgment entered for the damages which were given, but that a new trial could not have been granted. Under these circumstances, and assuming that evidence of malice in the acts or communications of the officials of a corporation in the conduct of their business would be an answer to a plea of privilege, and concurring with what has been already said by your Lordships, I am of opinion that the appeal should be disallowed.

LORD DAVEY. My Lords, I am of the same opinion. I think that the words complained of were not fairly susceptible of any meaning that would have justified the jury in finding them to be libellous. I also think that the words in question were true in fact in the only sense relevant to the context in which they are found, and I agree with the learned judges in the Court of Appeal that there was no evidence of malice to be submitted to the jury.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 8, 1896.

Solicitor for appellant: *R. C. Ponsonby.*
Solicitors for respondent: *Deacon, Gibson & Medcalf.*

[HOUSE OF LORDS.]

THE GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY, LIMITED . . } APPELLANTS;

AND

THE MANILA RAILWAY COMPANY, LIMITED, AND OTHERS . . . . } RESPONDENTS.

H. L. (E.) 1896 Dec. 10.

Company—Floating Security—Debentures—Mortgage of Assets of a Company—Priority.

A company issued debentures by which it undertook to pay the principal at a distant day and interest on fixed days half-yearly and charged by way of floating security all its property present and future. A condition indorsed on the debentures provided that "notwithstanding the said charge" the company might in the course and for the purpose of its business sell or otherwise deal with its property until default should be made in payment of interest for three months after the same should have become due, or until an order or resolution for winding up. After an instalment of interest had been due more than three months but before the debenture-holders had taken any step to enforce their security the company by an issue of bonds mortgaged specific assets:—

Held, upon the construction of the condition, that after the expiration of the three months the debentures remained a floating security till the holders took some step to enforce it and prevent the company from dealing with its property, and that the debenture-holders were not entitled to an injunction restraining the company from paying interest to the bond-holders.

The decision of the Court of Appeal, [1895] 2 Ch. 551, affirmed.

In 1888 the Manila Railway Company issued debentures of 100*l.* each to secure 730,000*l.* By each of the debentures the company agreed that they would on January 1, 1978, or on such earlier date as the principal moneys thereby secured should become payable, in accordance with the conditions indorsed thereon, pay the bearer 100*l.*, and in the meantime pay interest at the rate of 6*l.* per cent. per annum by equal half-yearly payments on January 1 and July 1 in each year. And the company thereby charged "by way of floating security all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. This

H. L. (E.) 1896

GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY v. MANILA RAILWAY CO.

debenture is issued subject to the conditions indorsed hereon, and all persons may act accordingly." Condition 2 indorsed on each of the debentures was as follows: "Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due, or until an order of some Court of competent jurisdiction shall have been made, or a special or extraordinary resolution shall have been duly passed for the winding-up of the said company."

The company made default in payment of the interest that fell due upon the debentures on January 1, 1892.

By an indenture dated March 1, 1892, and made between the Manila Railway Company and the respondents, the Merchants Trust, Limited, after reciting the issue of the debentures and the conditions of the same, and that all interest on the debentures had been paid up to July 1, 1891, inclusive, and further that the Manila Railway Company were about to issue mortgage bonds (hereinafter called the B Bonds) for the aggregate sum of 300,000*l.* bearing interest at the rate of 6 per cent., and that it had been agreed that the principal money and interest payable under the B bonds should be secured in manner hereinafter expressed, to the intent that, so far as regarded the property described in the schedule thereto, the charge securing the B bonds should rank in priority to the charge created by the existing debentures, the Manila Railway Company charged certain items of their property specified in a schedule thereto with payment of the B bonds, and undertook to execute a legal mortgage of the specified property to the Merchants Trust, Limited, as trustees for the B bondholders. It was assumed for the purposes of the argument in the Courts below that the B bonds were issued after the expiration of three months from the time when the interest on the debentures payable on January 1, 1892, became due.

In an action brought in 1895 by the appellants as debentureholders North J. ordered that the Manila Railway Company

should be restrained until judgment in the action or until further order from paying any interest out of the assets of the company to the holders of the B bonds. This order was discharged by the Court of Appeal (Lindley, Lopes and Rigby L.JJ.). (1)

Nov. 24; Dec. 10. *Farwell, Q.C.*, and *Disturnal*, for the appellants. The question is one of construction. The debentures must be read in conjunction with condition 2. They constitute what is called a "floating security," but they are a binding and immediate charge on all the property of the company: *Holroyd* v. *Marshall.* (2) A floating charge is a charge plus a contract to allow the business to go on until the happening of a prescribed event. But when that happens, it becomes a fixed charge: *In re Florence Land and Public Works Co.* (3) In *Driver* v. *Broad* (4) Kay L.J. says that such a charge is none the less a charge because power is reserved to dispose of the property if necessary. Then how long does the power to dispose of the property continue? It cannot be for an unlimited time. The reasonable construction is that at the expiration of the three months the floating charge became fixed, and the Manila Company could not deal with their property to the prejudice of the bondholders. When power is given to do certain things up to a certain date the words "and no longer" are always implied. The case is exactly like *In re Horne and Hellard.* (5) There Pearson J. held that the default in payment was the point at which what was previously floating became fixed, and pointed out that to adopt the view here contended for by the respondents it would be necessary to insert words giving power to carry on the business until a receiver was appointed or a winding-up order made. There is a difficulty in appointing a receiver in the Philippine Islands; but even appointing a receiver, which would not involve a suspension of business, is a different thing from creating a specific mortgage: such a mortgage cannot obtain priority over debentures

(1) [1895] 2 Ch. 551.
(2) (1861) 10 H. L. C. 191.
(3) (1878) 10 Ch. D. 530, 540, 546.
(4) [1893] 1 Q. B. at pp. 748, 749.
(5) (1885) 29 Ch. D. 736, 743, 744.

H. L. (E.) 1896

GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY v. MANILA RAILWAY CO.

which charge the whole undertaking. As to the argument that the appellants ought not to be allowed to stand by and allow the bonds to be issued, that may raise certain equities but it cannot possibly affect the construction of the condition.

Levett, Q.C., and *P. A. Abraham*, for the Manila Railway Company. A floating security floats until the holder takes some step to enforce it. Until that happens the intention is that the company shall deal with its property in the course of its business. The condition prevents the debenture-holders from taking steps till the expiration of the prescribed period. After that they may take steps, but here they did not. The words "or until an order" &c. mean unless in the meantime an order is made or a resolution passed to wind up, at the instance of persons other than the debenture-holders. Any other construction would paralyze the company. Floating securities are, in the words of Lord Macnaghten in *Tailby* v. *Official Receiver* (1), "dormant" till the holder takes the proper steps.

[They were stopped.]

A. R. Kirby, *E. Beaumont*, and *C. E. E. Jenkins*, for other parties, were not heard.

LORD HALSBURY L.C. My Lords, this is a question turning on a very small point—the construction of the terms of the second condition indorsed on the instrument in question. It seems to me it is impossible, in the construction of any human language, to exclude the situation of the parties, and the meaning that the transaction in which they themselves are at the moment engaged will present to the mind of either of the contracting parties. Now, what is this instrument? It is a debenture upon which it is intended that money should be lent to a company which makes its money by trade, and I am asked to suppose that it was the intention of this condition that upon default being made in the additional period of grace given, from that moment the whole of the commercial conduct of this trading company was to come to an end. I entirely repudiate the idea that Mr. Farwell has suggested as to

(1) (1888) 13 App. Cas. at p. 541.

standing by and not interfering, and so on. The parties contemplated that the thing might go on and not be wrecked by mere lapse of time. That is the security which they had in their minds. The effect of Mr. Farwell's construction would be not such a security as was agreed to. I must construe the document as it is; and looking at the document as it is, it appears to me that it would be so absolutely unworkable in its operation that I do not think the parties could have contemplated such a condition of things as this—that the moment the period of grace had elapsed, at that moment the power of the company to do anything with the property of the company ceased. How could that be the meaning? As a matter of business I should have thought it was impossible. I quite agree that mere absurdity of the conclusion will not necessarily govern the language used unless it is susceptible of another interpretation. Is the language susceptible of another interpretation? I think it is. I quite agree with Mr. Farwell that in some cases, looking at the nature of the transaction and the thing that is being dealt with, if you use the phrase that you may do so and so until a certain time, you may imply what if you are reading it at large you must supply in terms, "and no longer." One is familiar with many cases where that construction is given to the words, but until one knows the concrete case in respect of which the language is so to be construed, I deny that it is true to say that in every case where you give some power, or some liberty to deal with some matter up to a given time, you must necessarily imply the words "and no longer." Here, when I come to look at the thing to be done, the object of the parties, the interest to both that the commercial power of the company should continue until it was absolutely brought to an end by course of law or the contingencies contemplated by the parties themselves, I deny that I am bound to put in the words by construction "and no longer." If the words, therefore, are at all susceptible of the meaning which has been attributed to them by the Court of Appeal, it appears to me, looking at the nature of the document and the nature of the transaction in which the parties were engaged, it is much more reasonable to suppose that there was

H. L. (E.) 1896

GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY v. MANILA RAILWAY CO.

to be no interference with the power of the company to treat this as a floating security until the intervention of those things, which were familiar to both parties, might and could at the option of the parties put an end to any such transaction at all.

My Lords, under those circumstances it appears to me that the judgment of the Court of Appeal ought to be affirmed, and that this appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I also think the judgment of the Court of Appeal is quite right.

A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.

In the present case it was intended that the right of intervention on the part of the debenture-holders should be suspended for a time after default. That is what the second condition points to, and I do not think it was meant to do more. The condition, no doubt, is awkwardly expressed. If the condition had said, "Notwithstanding the said charge the debenture-holders shall not be entitled to enforce their security" during the prescribed period of grace, there would have been no difficulty. What it does say is, "notwithstanding the said charge" —that is, as I understand it, "notwithstanding the right of the debenture-holders under the said charge"—the company shall be at liberty to carry on their business for the prescribed period unless there is a winding-up in the meantime. During the period of grace, or until there is a winding-up, the company are to be free to carry on their business: they are to carry it on as of right. When that period comes to an end, the charge will have its ordinary effect. Thenceforward so long as the default lasts the business will be carried on, not as of

right, but by the sufferance of the debenture-holders and at their mercy. That, I think, is all that was meant.

Any other construction would obviously lead to consequences which it is impossible to suppose the parties could have intended. It is impossible to suppose that they could have meant that at the end of the period of grace the floating security should be turned into a fixed and binding charge, and that the business without being stopped should be allowed to drag on in a paralyzed and helpless condition. For these reasons, my Lords, I think that this appeal should be dismissed.

LORD SHAND. My Lords, I am also of opinion that this appeal should be dismissed. I confess that upon first reading the words contained in the second condition indorsed on the debentures I was impressed, as others have been before whom the case has come for decision, with the view that the appellants' interpretation was sound; but upon further consideration, and after careful examination of the language, I have come to a different opinion.

The inconveniences which would result from the construction maintained by the appellants are obviously so great, that I think the Court should scrutinize the language in order to see whether that is the only construction that can be adopted, or whether it is a reasonable construction; and I do not think it is either necessary or reasonable. The result of the argument presented by Mr. Farwell appeared to be this—that the company going on with its business after default for upwards of three months in the payment of interest on its debentures, there might be two classes of persons in different situations: one class of persons in ignorance of the terms of the debentures would be in safety to deal with the company, while another class with a knowledge of the terms of the debentures would be unsafe to deal with the company.

I should have very great difficulty in any case, even upon the construction of the instrument which has been presented, in holding that if the creditors in these debentures lay by and took no step whatever to arrest the business, or to put a receiver in charge of the business, they could affect any one in the transaction of business with the company. But I have

H. L. (E.)
1896
GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY v. MANILA RAILWAY CO.
Lord Shand.

come to be of opinion with your Lordships, and with the Court of Appeal, that the true construction of this deed is that contended for by the respondents, and which has been given effect to in the judgment complained of. The purpose and effect of the condition which was added—the condition which is appended to the debenture, and which must be regarded as part of the debenture—was simply, as it appears to me, to secure that the company for three months after default in any case should have the power to go on with the business, unless of course there was a receiver appointed in the meantime. The deed gives the company that power of going on, but it does not say that at the expiration of three months after default they shall not go on with the business. It does not use any words such as the words "and no longer," which I think one would have expected to be used there, considering the inconveniences that would result in the transaction of the business from the construction put upon the words by the appellants. It appears to me that the company were entitled to go on with the business longer, and until something would be done in the way of active interference on the part of the debenture-holders to make it known to all concerned that they acted on the power which they had in respect of default in payment of interest. And in the absence of any application for a receiver or for any order of the Court to bring the company to an end, I am of opinion that the debenture-holders' security remained as it was, and that it cannot be said that the company was paralyzed as from the moment when the period expired.

LORD DAVEY. My Lords, I am not afraid to say that I have had very considerable doubt about the true construction of this instrument. I think it is susceptible of both constructions which have been put forward; but I am bound to say, if I merely confined myself to trying to put a meaning upon the words that are used, I should come to the conclusion to which North J. came and agree with Mr. Farwell's argument. But on the other hand, one sees that these are conditions and terms inserted in an instrument regulating the rights of the mortgagees of the company relatively to the company, and of the company relatively to its mortgagees; and, like Lindley L.J., when I look

to the way in which Mr. Farwell's construction would work, and when I see that it would work somewhat, I will not say unjustly, but in the direction of bringing about a result which could hardly have been within the contemplation of the parties —or perhaps it might be sufficient to say when, as it appears to me, Mr. Levett's construction is conceivably more likely to have been the meaning—I think that is a reason, when two considerations so evenly balanced are presented to you, for preferring one to the other.

Now, my Lords, both constructions present great difficulties. I think the words "notwithstanding the said charge" present difficulties in the way of both the learned counsel who have argued the case before your Lordships. Mr. Farwell has to read the words "notwithstanding the charge" as if the words "floating security" were left out; but then he has to face the difficulty that the charge is only given as a floating security. On the other hand, Mr. Levett has a difficulty to meet in those words, I think, because certainly the expression "notwithstanding the floating security the security shall float for a certain time" is an unnatural one. My Lords, at one time I thought the latter words of the condition were meant to be a definition, for the purpose of these debentures, of what was intended by a floating security; but I see now that those words are capable of a construction which would make them fit in with the view of Mr. Levett. I think they may be construed, as I think Lindley L.J. intended to construe them, as meaning "unless in the meantime a winding-up order is made, or a winding-up resolution is passed."

On the whole, therefore, while admitting that the matter is one of very considerable difficulty of construction, I think the better course is to agree with the opinion of the Court of Appeal.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 10, 1896.

Solicitors for appellants: *Davidson & Morriss.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[HOUSE OF LORDS.]

H. L. (E.) 1896 Dec. 11.

CLUTTON . . . . . APPELLANTS;

AND

GEORGE ATTENBOROUGH & SON . . RESPONDENTS.

Cheque—Negotiable Instrument—"Issue"—"Fictitious or Non-existing Person"—Belief or Intention of Drawer—Bills of Exchange Act 1882 (45 & 46 *Vict. c.* 61) *s.* 2, *s.* 7 *sub-s.* 3, *s.* 73.

A cheque drawn to the order of a fictitious or non-existing person may be treated as payable to bearer within the Bills of Exchange Act 1882 s. 7 sub-s. 3, although the drawer believes and intends the cheque to be payable to the order of a real person.

A clerk in the account department of the appellants, by fraudulently representing to them that work had been done on their account by B., induced them to draw cheques payable to the order of B. in payment for the pretended work. There was in fact no such person as B. The cheques when signed by the appellants were sent by them to the account department for postage. The clerk obtained possession of the cheques, indorsed them in B.'s name, and negotiated them with the respondents, who gave value for them in good faith. The cheques were paid to the respondents by the appellants' bankers. The appellants having discovered the fraud brought an action against the respondents to recover the amount of the cheques as money paid under a mistake of fact:—

Held, that the cheques were "issued" within the meaning of the Bills of Exchange Act 1882 s. 2; that B. was a "fictitious or non-existing person" within the meaning of s. 7 sub-s. 3 of the Act, although the appellants believed and intended the cheques to be payable to the order of a real person; that the cheques might therefore be treated as payable to bearer, and that the action could not be maintained, the respondents being holders in good faith for value.

The decisions of Wills J. and the Court of Appeal, [1895] 2 Q. B. 306, 707, affirmed.

THE appellants, Messrs. Clutton, as land agents managed large estates. One of their clerks named Piper by an elaborate and long-continued system of fraud and forgery of vouchers and certificates (explained in detail in [1895] 2 Q. B. 306) caused cheques to be drawn payable to the order of George Brett and signed by members of the appellants' firm. The cheques then passed into the department in which Piper was for postage. He indorsed the cheques in the name of George Brett and took

them to the respondents, who gave him cash or value for them in good faith. The cheques were afterwards paid by the appellants' bankers to the respondents' bankers. There was no such person as George Brett, and no such work done or materials supplied as were vouched for by the forged vouchers and certificates. The appellants having discovered the fraud brought an action against the respondents to recover the amounts (between 3000*l.* and 4000*l.*) as money paid under a mistake of fact. The action was tried before Wills J. (without a jury) who gave judgment for the defendants (1) and this decision was affirmed by the Court of Appeal (2) (Lord Esher M.R., Lopes and Kay L.JJ.).

The plaintiffs brought this appeal.

By the Bills of Exchange Act 1882 c. 61 s. 2 "issue" means the first delivery of a bill or note complete in form to a person who takes it as a holder.

By s. 7 sub-s. 3, where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

By s. 73 a cheque is a bill of exchange drawn on a banker payable on demand.

Dec. 10, 11. *E. Tindal Atkinson Q.C.* and *W. A. Meek* for the appellants. First, the cheques were never in fact "issued" by the appellants, and there was no "delivery" of them within the meaning of the Act. The only delivery by the appellants was to Piper, who did not take the cheques as a holder. He in fact stole them, and having no title himself could not confer any on the respondents: *Baxendale* v. *Bennett.* (3) "Delivery" cannot mean delivery by a thief. There having been no "issue" the cheques were not negotiated or negotiable. By s. 21 sub-s. 1 of the Bills of Exchange Act every contract on a bill or cheque is incomplete and revocable until "delivery." Such delivery as existed was "conditional or for a special purpose only" within the meaning of s. 21 sub-s. 2 (*b*). *Rex* v. *Lambton* (4), in which it was held that a special indorsement does not transfer the property in a bill of exchange until delivery, shews what

(1) [1895] 2 Q. B. 306.
(2) [1895] 2 Q. B. 707.
(3) (1878) 3 Q. B. D. 525.
(4) (1818) 5 Price, 428.

H. L. (E.) 1896 CLUTTON v. ATTENBOROUGH & SON.

will amount to delivery. Secondly, the cheques were not payable to bearer within the meaning of the Act. The payee was not a "fictitious or non-existing person" within the meaning of the statute, as the appellants believed and intended him to be a real person. "Fictitious" has reference to the mind of the drawer. *Bank of England* v. *Vagliano* (1) has no application, because there the acceptor himself put the bills in circulation, and was therefore estopped as against his own bank from denying their validity. In that case the acceptor did not know the payee to be fictitious, but the drawer did, and his knowledge brought the case within the section. Here the drawer did not know it. *Ingham* v. *Primrose* (2) referred to by Lord Watson in *Scholfield* v. *Earl of Londesborough* (3) is distinguishable, on the ground that in that case an acceptor "had negligently put into circulation a negotiable document which had not been properly cancelled." Here there was no transfer of property: *Ex parte Cote, In re Deveze.* (4) It is just as if the cheques had been stolen from a safe or an unlocked drawer, as in *Baxendale* v. *Bennett.* (5) The crucial question is the mind of the drawer. "Non-existing" adds little or nothing to the force of "fictitious," and in all cases, including *Bank of England* v. *Vagliano* (1), the section has been interpreted to mean fictitious to the knowledge of the drawer, who therefore cannot be heard to complain of the forgery of the indorsement. There can be no doubt here that the drawer of the cheque intended to pay a real person; and there was no negligence in the transaction, or none such as to be the proximate cause of the loss.

Sir E. Clarke Q.C., *Joseph Walton Q.C.* and *S. Macaskie* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, I confess I approach the consideration of this case with some surprise, because it appears to me that every part of the case is so far covered by authority that I should have thought it would be impossible to argue it.

(1) [1891] A. C. 107.
(2) (1859) 7 C. B. (N.S.) 82.
(3) [1896] A. C. 514, 538.
(4) (1873) L. R. 9 Ch. 27.
(5) 3 Q. B. D. 525.

The facts are now beyond doubt, that the person who drew this cheque intended to draw a cheque, that he intended this cheque to be paid, and that he handed this cheque to his clerk. It is perfectly immaterial that he was induced to draw this cheque and to hand it to his clerk by fraud. What has that to do with the validity of the cheque as against a bonâ fide holder for value when it gets into the hands of that bonâ fide holder for value? It seems to me that if this case was treated as if it were possible to raise that question, it would be a most serious blow against the currency of negotiable instruments—that is to say, if you are to go into the history of every negotiable instrument, in itself perfectly genuine, in respect of the person who drew it and the person who issued it. There is one observation I must make upon the word "issued." If, contrary to the intention of the person who had signed the document, it got out of his possession, it being stolen out of his strong-box or what not, I may or may not have some opinion as to what would be the legal result of that; but that is not the question here, and I therefore absolutely decline to consider it. It would be beside the ground upon which this case ought to be decided, and I think it undesirable to raise new questions on a matter which, as it seems to me on the facts of this case, is so perfectly and manifestly plain. The drawer of these cheques hands them to one of his own clerks, puts them in circulation, and they get into the hands of a bonâ fide holder for value. Now, forsooth, we were treated to a long argument to shew what was the intention of the drawer—to make that which is a bill payable to bearer a bill payable to order only. I have nothing to do with the intention of the drawer beyond this, that I find the document is on the face of it made payable to a person who is "non-existing." Whatever might have been said in *Vagliano's Case* (1), where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words "fictitious" and "non-existing," it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a non-existing person. Why am I, upon this very

(1) [1891] A. C. 107.

H. L. (E.) 1896 CLUTTON v. ATTENBOROUGH & SON. Lord Halsbury L.C.

plain and manifest state of facts, to inquire into what would be the case if there was a person, as there was in *Vagliano's Case* (1), who might plausibly be represented as the person intended by the drawer to be the person to whom the payment was to be made? In this case no such question arises at all; and treating, therefore, these cheques as cheques payable to bearer, the broad fact comes that the genuine drawer attached his own signature to cheques perfect in form, that he handed them to his own clerk for the purpose of their being paid away, but by an act of fraud on the part of a clerk they get into the hands of a bonâ fide holder for value; and we are treated to this somewhat protracted argument in order to decide the question whether under these circumstances the drawer of these genuine cheques is liable upon them to a person who has received them in good faith and paid value for them.

My Lords, I do not profess to differ in any one respect from the judgments which have been delivered by the Court of Appeal; and my own opinion is that it would be treating this case with a respect that it does not deserve if one were to go more elaborately into the question than to say that I entirely concur with what was said by the learned judges in the Court of Appeal, and that I hope we shall not again have an argument of this sort upon a matter which, if it really could be made a matter of question, would throw very considerable difficulty and doubt upon the currency of negotiable instruments. I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the case too clear for argument. Messrs. Attenborough, having taken these cheques in good faith for value and without notice of any irregularity in their history, are entitled to treat them as payable to bearer.

LORD SHAND. My Lords, I am also of opinion that this appeal should be disallowed.

The first question to be determined in the case is whether the cheques in question were or were not, in the language of the

(1) [1891] A. C. 107.

statute, to be "treated as payable to bearer." Upon that question I entertain no doubt. Apart from the dicta and authority of the *Vagliano Case* (1), I should have had no difficulty on the statute. The statute expressly provides that where the payee is a fictitious or non-existing person the bill (and under the statute a cheque is to be regarded as a bill) may be "treated as a bill payable to bearer." These cheques were in favour of a person of the name of Brett—he was fictitious, because that name had been provided by a person who wished to commit a fraud and to appropriate the money of his employer. He knew no person of that name, and the person who got the cheques knew no one of that name, and, in the language of the statute, I think these were therefore cheques in favour of a fictitious person and a non-existing person. But it appears to me further that the decision and grounds of judgment in *Vagliano's Case* (1) are directly applicable to the present. There is no limitation in the language of the statute of the effect of the insertion of the name of the fictitious or non-existing person as payee of a cheque to the case where this is done in the knowledge of the drawer, and nothing to warrant a judicial interpretation of the statute in this limited way.

Treating these documents, then, as cheques in favour of bearer, what is the other point that has been maintained? It has been said that the cheques were never issued. My Lords, I do not stop to notice what the special meaning of the word "issued" in the statute is defined to be. The cheques in question were parted with by the employer to his clerks, and it was the employer's desire and intention that they should be sent out as cheques to be paid by the banker in ordinary course. By a system of fraud these cheques passed out of the hands of one clerk into the hands of another, and ultimately into the hands of the respondents in return for full value. My Lords, it appears to me that cheques which have been signed and intended by the drawer to be issued, and which were parted with by him and so issued, although parted with and issued in consequence of fraud practised on the drawer, must in the hands of a bonâ fide holder for value be valid and effectual.

(1) [1891] A. C. 107.

H. L. (E.)
1896
CLUTTON
v.
ATTEN-
BOROUGH
& SON.
Lord Shand.

The learned counsel for the appellants argued that the case was the same as if the cheques had been stolen from a strong-box in which they had been locked away—as if they had been cheques which it might be the drawer kept in his own repositories, and which were either not intended to be issued at all, or, at all events, to be issued only in certain contingencies. That would, however, be an entirely different case from this. I agree with what the noble and learned Lord on the woolsack has said, and with what was said by Kay L.J. in the Court of Appeal, namely, that if bills under such circumstances were not to have currency and to be negotiable, it would be a very serious blow to the use of negotiable instruments in this country. On these grounds I am of opinion with your Lordships that the arguments which have been maintained at the Bar are untenable.

LORD DAVEY. My Lords, I also think that this case is too clear for serious argument, and I concur in the judgment which your Lordships have proposed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 11, 1896.

Solicitor for appellants: *H. S. Clutton.*
Solicitors for respondents: *Stanley, Attenborough & Tyer.*

[HOUSE OF LORDS.]

CURRIE . . . . . APPELLANT; H. L. (Sc.)

AND 1896

M'KNIGHT . . . . . RESPONDENT. *Nov.* 16.

Ship—Maritime Lien for Damage by Collision—Mortgagee—Scottish Law.

The maritime law of Scotland being the same as that of England, the law of Scotland recognises a maritime lien in cases of collision.

In order to render a ship liable to a maritime lien for injury caused the ship itself must be the instrument which causes the damage.

The Bold Buccleugh, (1851) 7 Moo. P. C. 267, approved.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland (1), which recalled the decision of the Sheriff-Substitute of Lanarkshire.

The appellant was the owner of the S.S. *Easdale*. The respondents were the executors of Samuel M'Knight, mortgagee of the S.S. *Dunlossit*. Samuel M'Knight died after this appeal had been lodged, and his executors were by order of this House, on May 4, 1896, made parties to the appeal.

Two questions were raised in the appeal: first, whether the law of Scotland recognised and gave effect to a maritime lien in the case of a collision and cognate cases; and, secondly, whether the appellant was entitled to a maritime lien.

The circumstances are fully set out in the judgment of Lord Watson. (2) It need, therefore, only be stated here, that the First Division of the Court of Session in *Currie* v. *Allan* (3) found in law that the cutting of the ropes of the *Easdale* by the master and crew of the *Dunlossit* made the owners of the *Dunlossit* liable to the owner of the *Easdale* for the damage resulting to the *Easdale*. That decision was not brought to this House on appeal, and whether correct or not it became as regards the parties res judicata. To that action this was the sequel. The *Dunlossit*, having been arrested on the dependence of the above action, was at the instance of her mortgagee

(1) 22 R. 607. (2) Post, pp. 102, 103.

(3) (1894) 21 R. 1004.

H. L. (Sc.) 1896 CURRIE v. M'KNIGHT.

judicially sold. A competition for the price immediately arose between (inter alios) the appellant, Currie, the owner of the *Easdale*, and the respondent, M'Knight, the mortgagee of the *Dunlossit*. The Sheriff Substitute (Balfour) found, on January 19, 1895, that the appellant had a maritime lien over the *Dunlossit* for the damage sustained, and gave him a preference to the mortgagee over the price. The Second Division, on May 24, 1895, held that even if the doctrine of maritime lien as recognised in England were recognised in Scotland, in the circumstances the appellant had no maritime lien over the vessel; and that the mortgagee had a first claim to the price. The Lord Justice-Clerk (Macdonald) and Lords Young and Trayner were of opinion that the doctrine of maritime lien did not obtain in Scottish jurisprudence.

1896. July 27, 28. *Joseph Walton, Q.C.*, and *A. S. D. Thomson* (of the Scottish Bar), for the appellant. The decision of the Court of Session is erroneous. The law of Scotland recognises the doctrine of maritime lien in such a case as this. There is no peculiarity in the law of Scotland in this department of its jurisprudence which distinguishes it from the maritime law of other nations, or in particular from the Admiralty law of England: Lord Justice-Clerk (Inglis) in *Boettcher* v. *Carron Co.* (1) The spirit of the cases, *Wood* v. *Hamilton* (2), *Hay* v. *Le Neve* (3), and *Boettcher* v. *Carron Co.* (1)—where the Scottish Courts in this department of law were influenced by English law and practice—ought to have induced the majority of the Court of Session to have declared the doctrine of maritime lien to be part of the law of Scotland. Further, the same code of shipping law has been passed by Parliament for both England and Scotland, and propriety and expediency demand that this doctrine should obtain in both countries. The doctrine was enunciated in *The Bold Buccleugh* (4); and it has stood the test of many years, and has never been modified: see *The Aline*. (5) It therefore

(1) (1861) 23 D. p. 330.
(2) (1788) Mor. Dict. 6269; 3 Pat. App. 148.
(3) (1822–4) 1 S. (2 ed.) 356; 2 Sh. App. 395.
(4) (1851) 7 Moo. P. C. 267.
(5) (1839) 1 Wm. Rob. 111, at p. 118.

must be sound in principle and suited to the necessities of a commercial country, and it is anomalous that it should not be accepted in Scotland, and that ships which have caused a collision in any part of the world should be affected by a maritime lien if proceeded against in London, but not if proceeded against in Leith.

Secondly, to give a right to arrest the ship it is not essential that the accused ship itself should be the weapon which inflicted the injury. The Admiralty Courts have never held that there must be a direct contact. It is enough there should be negligence on the part of the master acting within the scope of his duty in the navigation of the ship. *The Batavier* (1) : accident by swell in a river caused by the passing of the steamer held to create a right to proceed in rem. *The Wheatsheaf* (2) : the actings of the *Intrepide* rendered a collision between the *Wheatsheaf* and her tug imminent, whereupon the tug to save herself slipped the tow-rope, and the *Wheatsheaf* was damaged. *The Night Watch* (3) decided that if negligence in the management of the ship causes someone else to do the damage that was enough. There the *Prince* when in tow of the *Night Watch* was brought into collision with another vessel, and the *Night Watch* was held liable to the jurisdiction of the Court. *The Energy* (4) was a case where the tug caused the collision between the other two vessels. In *The Industrie* (5) the vessel was left in the fairway of the channel, and to avoid her the plaintiff's vessel took the ground. In *The Sisters* (6) one ship by the improper navigation of a second ship was compelled to alter her course and did damage to a third ship ; the second ship was held liable. In *The Niobe* (7), the *Niobe* did not cause the actual damage. She allowed herself to be carried in the course directed by the tug without warning the tug of danger, and the tug injured another vessel. There is no doubt the appellant must shew the ship was in fault. In the present case the damage done was owing to the unskilful navigation of

(1) (1854) 9 Moo. P. C. 286.
(2) (1865) 2 Asp. (O. S.) 292.
(3) (1862) 32 L. J. (Adm.) 47.
See also *The Julia*, (1861) Lush. 224; *The Robert Pow*, (1863) 32 L. J. (Adm.) 164.
(4) (1870) L. R. 3 A. & E. 48.
(5) (1871) L. R. 3 A. & E. 303.
(6) (1876) 1 P. D. 117.
(7) (1888) 13 P. D. 55.

H. L. (Sc.) 1896 CURRIE v. M'KNIGHT.

the ship. Unmooring a ship is part of the navigation of the ship. If, therefore, the ship had burst the *Easdale's* mooring-ropes by turning on the tide instead of the master using his knife to cut the moorings, in both cases that would be damage done by the ship. If the *Dunlossit* had never moved, and if something had caused the damage in the handling of the ship, that would be enough.

The Vera Cruz (1) does not apply: there the only question was whether an action in rem against the ship would lie under Lord Campbell's Act. *The Theta* (2) was a similar case.

A. Graham Murray, L.A., Q.C., and *Sir Walter Phillimore, Q.C.*, for the respondents. The doctrine does not apply in France or Germany. There is no trace of it until *The Bold Buccleugh* (3); and it has no application to the law of Scotland. It has never received any recognition either in practice, by text-writers, or by judicial decision in Scottish procedure. The arrestment of the vessel gives the pursuer of the action on which the arrestment was used a claim to a preference over the subject arrested as from the date of the arrestment; and this remedy has been found quite sufficient. It is only where the interest of a mortgagee is involved that questions may arise. Further, it is found to have been recognised only within recent years in England, and not to be general in the law of all nations. The application of the doctrine as exemplified in the decided cases leads to such arbitrary and anomalous results that it cannot be said to be required by the principles of equity which are common to the jurisprudence of both England and Scotland. It should not, therefore, be now introduced into the law of the latter country.

[They also cited *Lloyd* v. *Guibert* (4); 3 & 4 Vict. c. 65, s. 3; 24 Vict. c. 10, s. 7.]

On the second point they were stopped.

Joseph Walton, Q.C., in reply.

LORD HALSBURY L.C. My Lords, this is a claim to establish a maritime lien against the ship *Dunlossit* by reason of

(1) (1884) 9 P. D. 96.
(2) [1894] P. 280.
(3) 7 Moo. P. C. 267.
(4) (1865) L. R. 1 Q. B. p. 124.

damage sustained by another vessel under circumstances which it is necessary to state briefly to see whether the claim is sustainable.

The crew of the *Dunlossit*, in order to enable that ship to get to sea, cut the cables of another vessel, the *Easdale*. This proceeding on the part of the crew I will assume for this purpose to have been an unlawful act, and subjecting those responsible for the acts of the crew of the *Dunlossit* to a liability for the damage suffered by the *Easdale*. But there seems to me to be no connection between the damage to the *Easdale* and any act or thing done by the crew of the *Dunlossit*. That the act done was done in order to enable the *Dunlossit* to start does not make it an act of the *Dunlossit*. That it was done by the crew of the *Dunlossit* does not make it an act of the *Dunlossit*; and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

I am, therefore, of opinion that it would be impossible in an English Court of Admiralty to maintain that the injury suffered by the *Easdale* gave rise to a maritime lien any more than if the master of the *Dunlossit* had unlawfully taken away some of the *Easdale's* property.

My Lords, having arrived at this conclusion, I am not certain that to discuss the other matters involved in this appeal is not outside any question properly arising here. If the judgment had been the other way, it would have been necessary to discuss whether the law which prevails in England prevails also in Scotland.

I cannot doubt that on such questions it is the law of Great Britain that prevails, and that Scottish Admiralty Courts and English Admiralty Courts administer the same law. The Admiralty law, as we know it, differs from the common law of England, and the common law of Scotland differs from the common law of England. But the reason is obvious—the laws

H. L. (Sc.) 1896 CURRIE v. M'KNIGHT. Lord Halsbury L.C.

of England and Scotland were derived from different sources in respect of these two branches of the law. The Admiralty laws were derived both by Scotland and England from the same source; and as it is said by no mean authority that the Admiralty law was derived from the laws of Oleron, supplemented by the civil law, it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island.

I only wish to add that I think the case of *The Bold Buccleugh* (1), in the Privy Council, was well decided. Its authority, I think, has never been shaken, and I should be sorry to see at this distance of time anything done which would weaken its authority.

I am, therefore, of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, the steamship *Dunlossit* was sold under a warrant issuing from the Sheriff Court of Lanarkshire, at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have been made respondents in this appeal. The price of the vessel having been paid into Court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the *Dunlossit* in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a surrogatum for the ship.

The findings of the decree upon which the appellant's claim is founded shew that during a night in November, 1893, three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbour. The *Dunlossit* was in the centre of the tier, the steamship *Easdale*, belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the *Dunlossit*. There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the *Dunlossit*, which was in serious peril of damage from contact with the vessels between which she

(1) 7 Moo. P. C. 267.

lay, and the possibility of another vessel moored in front of her coming into collision with her, got up steam, and, after notice of their intention, cut the mooring ropes of the *Easdale*, and stood out to sea. The *Easdale* was short-handed owing to the defection of two of her crew, and, being unable to get up steam, was driven ashore and damaged. The master of the *Dunlossit* acted solely for the protection of his ship against present and possible damage. The First Division of the Court, reversing the decision of the Sheriff-Substitute, held that the cutting of the *Easdale's* ropes by the crew of the *Dunlossit* was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits.

The Sheriff-Substitute in the present suit sustained the appellant's claim, being of opinion that, in the sense of law, the proceedings of the *Dunlossit* crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the *Easdale*. His decision was reversed, on appeal, by the Second Division of the Court of Session, who dismissed the claim. Three of the learned judges held that, according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel whether by collision or otherwise. Lord Rutherfurd-Clark abstained from expressing any opinion upon that point, which did not appear to him to arise for decision. All of the learned judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the *Easdale* were not due to the fault of the *Dunlossit* as a ship.

Both these grounds of judgment involve considerations, not of municipal, but of maritime law. Had they been confined to the second point, I should have seen no reason to differ. But the first point is one of considerable importance to the shipping community; and I am unable to concur in the views which were expressed with regard to it by the majority of the Court.

From the earliest times the Courts of Scotland exercising jurisdiction in Admiralty causes have disregarded the municipal rules of Scottish law, and have invariably professed to administer the law and customs of the sea generally prevailing among

H. L. (Sc.) 1896 CURRIE v. M'KNIGHT. Lord Watson.

maritime States. In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other States for the guidance of the Courts. Mr. Bell, who wrote more than sixty years ago, states (II. Comm. 5th edit. p. 500) that the decisions which were at that time of the greatest authority in Scottish Maritime Courts were those of the High Court of Admiralty of England. His statement is fully borne out by the authorities, to three of which I think it sufficient to refer. In 1788 the Court of Session, in a case relating to lien for furnishings made to a ship (*Wood* v. *Hamilton* (1)), ordered the opinion of English counsel to be taken to ascertain the practice of England in such cases, and thereafter gave judgment in accordance with that opinion, although it was contrary to previous decisions of their own Court; and their judgment was affirmed by this House. (2) In the well-known case of *Hay* v. *Le Neve* (3) the Court of Session followed what they understood to be the rule of the English Admiralty Court; and, in moving the reversal of their judgment, Lord Gifford, who delivered the opinion of the House, said: "We are here on the law of the Admiralty of England." (3) In *Boettcher* v. *Carron Co.* (4) the identity of the maritime law of Scotland with that of England was distinctly proclaimed by the late Lord President Inglis, then Lord Justice Clerk, who was certainly not disposed to accept English law in any case where it differed from the law of Scotland. After referring to various causes which had contributed to produce that identity, his Lordship observed: "It would be very surprising if, at the present day, ships enjoying the privileges and subject to the conditions of British registry should sail from the ports of the United Kingdom under the same flag, and subject to the same statutory regulations in all respects, and yet that, in cases of collision, the legal rights of the parties might vary according as the case might be tried in one British Admiralty Court or another."

It does not appear to me to be doubtful that if the *Dunlossit*

(1) Mor. Dict. 6269.
(2) 3 Pat. App. 148.
(3) 2 Sh. App. p. 403.
(4) 23 D. p. 331.

had been so negligently navigated as to run into and sink the *Easdale* she would, in the absence of contributory fault by the *Easdale*, have been subject to a lien for the damage occasioned to the latter vessel in any English port; whereas, according to the law laid down in this case, no such lien would have attached to her in a Scottish harbour. That such a conflict should be possible is inconsistent with the views expressed by the late Lord President in *Boettcher* v. *Carron Co.* (1), and also with the maritime code which ought to prevail in both countries, which, in my opinion, is neither English nor Scottish, but British law. That there may be conflicting decisions by the Courts of the two countries is possibly unavoidable, seeing that different conclusions may be arrived at even by Courts of the same country administering the same law; and I do not mean to suggest that a Scottish Admiralty Court is less free to examine the merits of an English authority than an English Court is to estimate the value of a Scottish decision, and to accept or reject it according to its own view of the law maritime. But it does not follow that the law either is or ought to be different in the two countries. This House has now become the ultimate forum in all maritime causes arising in the United Kingdom; and as your Lordships are, in my opinion, bound to apply one and the same law to the decision of all such cases, your judgments upon a proper maritime question, whether given in an English or in a Scottish appeal, must be of equal authority in all the Admiralty Courts of the Kingdom.

The Bold Buccleugh (2), which was decided by the Judicial Committee of the Privy Council affirming the judgment of Dr. Lushington, is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American Courts; and in the Admiralty Court of England it has for nearly forty years

(1) 23 D. p. 331. (2) 7 Moo. P. C. 267.

H. L. (Sc.) 1896 CURRIE v. M'KNIGHT. Lord Watson.

been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds. In my opinion, the substantial question which your Lordships have to determine in this case is whether *The Bold Buccleugh* (1) was decided according to the maritime law of Britain. If it was, the rule which it lays down must apply to all maritime causes of a similar kind arising in the Courts of Scotland.

It is unquestionably within the authority of this House to reconsider, and if necessary to overrule, the judgment of the Judicial Committee in *The Bold Buccleugh* (1); but it is no less clear that the opinions of the eminent judges who took part in the decision of that case ought not to be disregarded without good cause shewn. To my mind, their reasoning is satisfactory; and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam-power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.

The other point as to which the learned judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of *The Bold Buccleugh*. (1) I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or

(1) 7 Moo. P. C. 267.

manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the *Easdale* were not owing to any movement of the *Dunlossit*; they were wholly occasioned by an act of the *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage.

I am, therefore, of opinion that upon the second of these grounds the interlocutor appealed from ought to be affirmed.

LORD HERSCHELL. My Lords, the question raised by the appeal is whether the appellant is entitled to a maritime lien upon the vessel *Dunlossit* (or her proceeds), of which the original respondent, M'Knight, was the mortgagee.

In November, 1893, the vessels *Dunlossit* and *Easdale* were lying alongside one another at Port Askaig Pier, Islay. A heavy gale was raging, which the *Easdale* was unable or unwilling to face; the master of the *Dunlossit*, being anxious to put to sea and being unable to induce the master of the *Easdale* to let go his moorings, cut them and sent her adrift. The result was that the *Easdale* drifted ashore and was damaged. The owner of the *Easdale*, having obtained judgment against the owners of the *Dunlossit* for the amount of the damage thus sustained, sought by the present proceedings to maintain a maritime lien on the *Dunlossit* in respect of the damage done to the *Easdale* owing to the act of the master of the *Dunlossit*. I entirely agree with the Court below in thinking that no such lien can be sustained.

In the Admiralty Court in England a maritime lien has frequently been enforced, in cases of collision, against the vessel which was in fault, but no case could be cited which was at all similar to the present one. In all the cases referred to the damage had been caused either by a collision with the vessel which was to blame, or by that vessel having driven the other

H. L. (Sc.)
1896
CURRIE
v.
M'KNIGHT.
Lord Herschell.

into collision with some third vessel or other object. The doctrine was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. Whether the circumstances have always warranted the conclusions arrived at, it is not necessary to inquire. I express no opinion upon it; but the ground of the decision was in all cases this, that the vessel on which the lien was enforced had, in maritime language, done the damage. Here the *Dunlossit* did no damage. It was not by reason of the negligent navigation of that vessel that the disaster occurred. It arose simply from the wrongful act of the master in cutting the *Easdale* adrift. I am not prepared to extend the doctrine of maritime lien to such a case.

In the Court below three of the learned judges held that the doctrine of maritime lien which exists in England in cases of collision is unknown in the law of Scotland. I entirely agree with the late Lord President Inglis, that much as the law of Scotland differs from that of England in many respects, the Admiralty law is the same in the two countries. The Courts of Scotland are, of course, not bound by the decision of an English Admiralty Court in any new case that arises. But, taking it to be established that the Admiralty law of the two countries is the same, they would, no doubt, hesitate to differ from a long course of decisions by English Admiralty Courts of high authority. I think it right to add, as the matter is of much practical importance, that, in my opinion, the doctrine of maritime lien in cases of collision is, within the limits to which I have adverted, too well established to be now questioned.

LORD MORRIS. My Lords, I am also of opinion that the interlocutor appealed from should be affirmed, for the reasons that have been assigned by my noble and learned friend Lord Watson in his judgment, which I have had the advantage of reading.

LORD SHAND. My Lords, after what has been said by your Lordships, it is unnecessary to recapitulate the facts which gave rise to the claim of damages on the part of the owner of the steamer *Easdale* against the owners of the *Dunlossit*, which is the basis of the claim of lien maintained in this action. In a former action between these respective owners it seems to have been held by the Sheriff-Substitute that in the position in which the *Dunlossit* was, lying moored to the quay at Port Askaig, on November 17, 1893, when a gale of exceptional violence occurred causing serious peril of considerable damage, those on board of her were entitled to require the persons in charge of the *Easdale* to remove the moorings of that vessel so as to allow the *Dunlossit* to go out to sea; and that, as the request to do this was refused, the crew of the *Dunlossit* were entitled to cut the moorings, and that the owners of the *Dunlossit* were not liable for the damage resulting to the *Easdale*. This judgment was reversed by the First Division of the Court of Session, by whom it was held that the owners of the *Dunlossit* were responsible for the act of the captain in cutting the moorings of the *Easdale*, and for the damage which resulted to that vessel, which was subsequently ascertained to amount to 407*l*. 4*s*. 6*d*. No appeal was taken against this judgment; and this Court is not, therefore, called on, or indeed in a position to express, any opinion on the question thus decided. The appellant holds a final decree against the owners of the *Dunlossit*, and the question raised is whether, in the circumstances, he has in virtue of this decree a lien against the proceeds of sale of the ship which entitles him to be ranked preferably to the mortgagee.

I agree with your Lordships in thinking the appellant has failed to establish any such right of lien. For the reasons fully stated by my noble and learned friend, Lord Watson, and having regard to the authorities in the law of Scotland referred to by him—the maritime law to be applied in questions like the present—Admiralty questions—is, I think, the same in Scotland as in this country. I do not say that the Courts in Scotland are bound to accept a decision, not of this House, but given in other Courts in this country, as binding on them, or to give effect to these decisions unless they agree

H. L. (Sc.)
1896
CURRIE
v.
M'KNIGHT.
Lord Shand.

in thinking they are based upon sound and conclusive reasoning; but the greatest weight ought certainly to be given to a course of decisions in the Admiralty Courts in England, which has established a principle or rule of frequent application, for reasons which have commended themselves to many different judges. Thus, if the lien here claimed had arisen because of a collision occasioned by the fault of those navigating the *Dunlossit* in the course of navigation, I should say that the English authorities and the rule which these have so long established should be conclusive in a case occurring in Scotland, and that the evil referred to by the Lord President in *Boettcher's Case* (1), of having conflicting rules, applied in two different parts of the kingdom in maritime matters and in circumstances of frequent occurrence, should be avoided. If, then, this had been a case of collision caused by the fault exclusively of the *Dunlossit* as the offending ship, I should have had no difficulty in holding that the lien contended for existed. The learned Sheriff-Substitute, Mr. Balfour, in his judgment, has clearly and ably stated every consideration to support the view that the principle which has been applied in cases of collision ought to support the lien here claimed; but it seems to me, though I think the question is one not free from difficulty, that the act of the master in cutting the mooring ropes of the *Easdale* while attached to the pier, and so sending her adrift, does not make the *Dunlossit* an offending ship in the course of navigation, or the instrument which caused the damage, which seems to have been the test applied in all the cases which have hitherto occurred.

Ordered, that the appeal be dismissed with costs.

Agents for appellant: *Thomas Cooper & Co., for John E. Wilson, Writer, Glasgow, and Morton, Smart & Macdonald, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Webster, Will & Ritchie, S.S.C., Edinburgh.*

(1) 23 D. 330.

[HOUSE OF LORDS.]

OGSTON . . . . . APPELLANT;

AND

ABERDEEN DISTRICT TRAMWAYS COMPANY . . . . . } RESPONDENTS.

H. L. (Sc.)
1896
Dec. 14.

Nuisance—Obstruction of Street—Tramways—Snow and Salt—Interdict.

A tramway company after a heavy fall of snow cleared their track by means of a snow-plough and heaped up the snow upon the sides of the streets: they then scattered salt upon the rails and in the vicinity; the town council did not take any immediate steps to remove the briny slush so produced, and it was left upon the streets:—

Held, reversing the decision of the Second Division, that a legal nuisance had been committed which was not sanctioned by either the special or the general Tramways Acts, and that the default, if any, of the town council did not affect the primary liability of the tramway company.

APPEAL against interlocutors of the Second Division of the Court of Session, Scotland (1), in an action of suspension and interdict brought by the appellant, James Ogston, manufacturer in Aberdeen, against the respondents, the Aberdeen District Tramways Company. The appellant carries on his business in Aberdeen, and he sought to have the respondent company interdicted from clearing their lines of rails when there is snow upon the ground in such a way as to impede and obstruct the general traffic upon the public thoroughfares. The interdict asked for was two-fold: first, against heaping up snow which they remove from their lines of rails on to other parts of the streets and allowing it to lie there; and, secondly, against scattering salt upon the snow and thus forming a noxious mixture which caused serious injury to horses and other animals. The respondents' tramways extend to about thirteen miles in length—of these, owing chiefly to the narrowness of the streets, eleven miles are single sets of rails. The right of the respondents to use the streets for tramway traffic is derived from their special Act (35 & 36 Vict. c. cxciv.), and the amending

(1) 23 R. 340. All the cases on street obstruction are examined in *Barber* v. *Penley*, [1893] 2 Ch. 447.

H. L. (Sc.)
1896
OGSTON
v
ABERDEEN
DISTRICT
TRAMWAYS
COMPANY.

Acts of 1878, 1888, and 1894. These do not confer upon the respondents any right of control or use of the streets other than that of laying down rails and using them exclusively for tramway traffic.

The appellant alleged that the grievance complained of had been felt more or less since 1880; but it became acute in 1886. In the latter year he and others approached the town council with the object of getting them to put a stop to the practice. The town council at that time supported the appellant in endeavouring to get the respondents to discontinue what had become a serious danger and cause of damage. The remonstrances proved ineffectual, and the practice continued. The quantity of salt increased year by year, until in the winter of 1894–5 the quantity used by the respondents upon the streets was 172 tons. In the beginning of 1895 a letter was addressed to the town clerk on behalf of a number of citizens requesting the town council to adopt proceedings against the respondents. The reply received was that the town council repudiated all responsibility. They refused to do anything further. In these circumstances these proceedings were taken. A large body of evidence was led shewing that the mixture of salt and snow thrown and scraped on to the side of the streets, which was sometimes as high as the horses' knees, was a freezing substance of intense coldness which tended to crack the skin, set up inflammation, and ulceration, ending sometimes in the death of the horses which have had to pass through or stand in it.

The town council sent three witnesses—members of the council—to give evidence in favour of the respondents; but there was no official authority given for the respondents' acts, and the House held it had not been given. The evidence on this head is fully given by Lord Watson in his judgment. The Lord Ordinary (Low), on November 28, 1895, refused the interdict; and on December 20, 1895, the Second Division adhered. The ground of decision shortly was that, while satisfied that the snow and salt slush was injurious to horses driven through it, yet, that as the town council as the local authority refused to interfere in the matter and gave the respondents, at least, their moral support, the Courts of Law had no jurisdiction to interfere.

1896. Dec. 3, 4, 7. *Asher, D.F., Q.C.*, and *Haldane, Q.C.* (with them *D. M. Abel*, of the Scottish Bar), for the appellant. In Scotland, any member of the public can maintain an action for the purpose of obtaining general relief on behalf of the public: *Duncan* v. *Findlater* (1), (overruled by) *Mersey Docks Trustees* v. *Gibbs* (2); *Virtue* v. *Commissioners of Police of Alloa* (3); *Duke of Atholl* v. *Torrie*. (4)

The evidence proves that the respondents, by piling up the snow at each side of the rails and failing to have it removed, caused serious obstruction to the traffic. It is no answer for the respondents to say it is the duty of some one else to remove the snow. The question is whether the respondents are entitled to adopt the means they have hitherto adopted for keeping their line clear. In other cities, such as Edinburgh, Glasgow, and Dundee, the evidence is that the town authorities and the tramway companies work together in unison. In those cities, as soon as the snow is heaped up the corporation's servants come and take it away. In Aberdeen the respondents throw the snow off the rails, heap it up, and care for no one else's convenience; and the town council repudiate responsibility. The Court of Session has declined to interfere, holding that that Court was not justified in interfering when the local road authorities allowed the operation. This decision affirms the position taken up by the respondents, that they have an unqualified statutory right to keep their lines open by any means they think proper, without recognising any corresponding obligation to do so in such a way as will not prove prejudicial to the right of the general community. The decision of the Court of Session would bar the right of any one ratepayer coming to the Court for the redress of a nuisance caused by another ratepayer. It is not a question of the interference with the administration of the town, but between two ratepayers, both carrying on their business—a trading company on the one hand, and a person entitled to use the roads on the other.

A. Graham Murray, L.A., Q.C., and Sir *Robert Reid, Q.C.*

(1) (1839) 6 Cl. & F. 894.
(2) (1866) L. R. 1 H. L. 93.
(3) (1873) 1 R. 285.
(4) (1852) 1 Macq. 65.

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY.

(with them *J. C. Dove Wilson*, of the Scottish Bar), for the respondents. If the first alternative of the interdict sought were granted, it would make it illegal for the respondents to lift a single shovelful of snow from off their lines or scatter a grain of salt. When there is a fall of snow the question is, What is the best way to get rid of it? The evidence is that there is no practical means other than salt to clear the grooves of the rails. The statutory right the respondents have to "make" and "maintain" the tramways is a right to clear off the snow. In considering the question of nuisance, the exceptional nature of the storm of 1894–95 must be considered. The severity of the storm in Aberdeen was the reason the snow and slush was not more expeditiously cleared away. The respondents' operations were not a nuisance in the legal sense. The appellant has no right to pass over every part of the street, but merely a right of passage. That being the case, the only standard by which the question of impediment can be gauged is the standard of ordinary convenience. But the use of the snow-plough is simply the initial process of clearing the streets after or during a snow-storm. The town council, in the exercise of their discretion as managers of the streets, consider it for the public benefit as a whole that the streets should be so cleared by the respondents. The respondents are acting as the agents of and with the authority of the town council, and saving them great expenses; and it is not right that they should be interdicted from doing what the town council will have to do on the same occurrence of snow falling.

Asher, *D.F.*, *Q.C.*, in reply.

LORD HALSBURY L.C. My Lords, in this case the appellant, who has a place of business in Loch Street, Aberdeen, complains that the Aberdeen District Tramways Company obstruct the highways in the city of Aberdeen, and create a nuisance therein whenever a snow-storm occurs in that city. As to the facts which give rise to the complaint there is no serious dispute, and I do not understand that the Lord Ordinary or the Second Division of the Court of Session entertained any doubt that a serious inconvenience to horse traffic was caused

by the acts complained of. It appears that the tramway company, when a snow-storm occurs in Aberdeen, are in the habit of clearing the snow off their track and piling it at the side of their rails. The heaps of snow thus piled are left sometimes for as long a period as a week together; and for the purpose of facilitating their own traffic the tramway company scatter salt which causes the snow in the grooves of their rails to melt. The mixture thus created flows by gravitation into the heaps of snow already collected at the side, and forms a freezing mixture, which, I think, it cannot be doubted, causes injury to the horses and inconvenience to the traffic wherever and whenever the carriage traffic, other than that of the tramway company themselves, is compelled to force its way through the freezing mixture of salt and snow. It cannot be doubted that unless this can be justified by some legal authority this does constitute a nuisance to the highway.

If the question had arisen in England, I think some doubt might be entertained whether the obstruction as proved was such that a private person could sue without further proof of peculiar damage to himself; but that question does not arise according to the law of Scotland. Mr. Ogston is entitled to sue in respect of an interference with the highway, which is applicable to him in common with the rest of Her Majesty's subjects.

It is sought to justify the proceeding of the tramway company which I have described by the powers conferred by their Act of Parliament; and if the matters do constitute a nuisance, that is the only justification which is to be found on this record. I am of opinion that the Act of Parliament in question confers upon the respondents no such powers. It gives them the monopoly of using the tramway, where it is laid, with flange-wheels, or other wheels specially adapted to run on a grooved rail, and, except as otherwise specially provided by the Act, the track of the tramway is for all purposes to be and remain a part of the street or road. It is not suggested that except in respect of the exclusive use to which I have referred the tramway company have received any express authority to deal with the highways; but it is contended that in time of snow they can only continue the use of their tramway by scattering salt,

H. L. (Sc.)
1896
OGSTON
v.
ABERDEEN
DISTRICT
TRAMWAYS
COMPANY.
Lord Halsbury L.C.

and that if the municipal authority of Aberdeen were sufficiently prompt in sweeping up and carting away the freezing mixture thus created, the practice might be pursued without inconvenience to any one. This may be perfectly true; but it is an absolutely untenable proposition that any one may create a nuisance and shelter themselves from responsibility by suggesting that somebody else is under a legal responsibility to remove it. Each member of the public in turn might claim a right to create a nuisance by removing what was inconvenient to himself and set up the same defence.

The question would be a very different one if the road authority were the persons sued, and were setting up that the acts complained of were necessarily done in the general interest of the community and in the course of clearing the streets from obstruction. I do not say that such a defence would be certainly complete: it would introduce questions of fact and degree with which I am at present not prepared to deal. That a snow-storm must cause some inconvenience to every one may be true; but I cannot assent to the argument that a snow-storm in Aberdeen at some period of the winter is an extraordinary and unlooked for convulsion of nature, for which it is unreasonable to suppose that provision should be made; and the examples of Edinburgh and Glasgow would seem to indicate that it is not beyond the resources of civilisation to make such provision; but, as I have said, I decline to enter into this field of inquiry.

If it were true, as the Lord Justice-Clerk assumes, that we were dealing here with what was done necessarily under the sanction of the public authority of the place, a great many of his Lordship's observations would be, I think, very pertinent; but that proposition is absolutely contrary to the fact I have already pointed out, that upon the record no such authority is pleaded. If it had been pleaded I think the proof would have failed—indeed, I think it is distinctly disproved. Not only did the town council of Aberdeen make a regulation against the practice, but by their letter of February 1, 1886, they had informed the tramway company that they had been advised that their operations in this respect were unwarrantable and illegal, and that

if they did not desist the council would be compelled to take legal proceedings against them. I do not think that the town council of Aberdeen have ever altered their position in this respect. It is true that long after this action was raised they deputed three gentlemen to give evidence upon the trial of the action on behalf of the council in favour of the respondents. What legal operation such a transaction as this may be supposed to effect I am wholly unable to conceive. Adoption is, of course, out of the question. The acts complained of were not done and could not purport to be done under the authority of the town council: they were in fact done in absolute defiance of that authority. It is manifest, therefore, that if obstruction of the highway is proved, and a claim to persist in that obstruction insisted on, it is a proper case for interdict.

I am therefore of opinion that the interlocutors appealed from should be reversed; and I move your Lordships accordingly. [His Lordship read the order given at the end of the report.]

LORD WATSON. My Lords, I also am of opinion that the method practised by the respondents of clearing and keeping open their tramway rails whenever there is a fall of snow is attended with injurious consequences, amounting to a legal nuisance, to those members of the public who have occasion to use the streets of Aberdeen for horse traffic. The evidence shews that on these occasions their first step is to clear their track, which is laid along the centre of the street, by means of a snow-plough—an operation which increases the deposit of snow upon the other parts of the street. Their next operation, which is repeated from time to time, is to scatter salt upon their rails and in their vicinity, the object of which is to prevent snow or snow-water from freezing in their grooves. The snow and salt in combination form a wet, briny amalgam, which does not freeze, although its temperature is considerably below the freezing point of water. The briny slush so produced is left on the street, and in course of time it gradually permeates a large portion and sometimes the whole of the street. It is, in my opinion, amply proved that the mixture thus diffused is injurious

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY. Lord Watson.

to horses standing or moving in it, and that its saline element has a direct and noxious effect of its own, if the skin of the animals coming in contact with it has been perforated or abraded.

The respondents have endeavoured to justify these proceedings by advancing a series of propositions, ingenious if not altogether consistent, which I shall notice in detail.

The first of these, which is the only defence stated by them in the record, upon the assumption that the allegations of the appellant have been established, is to the effect that their operations in clearing and keeping clear their lines are "within their statutory rights." That plea, if well founded, would necessarily afford a good answer to the appellant's prayer for interdict. But neither the provisions of their special Act, nor those of the general Tramways Act of 1870, bear out that contention. Some statutory privileges they do possess which the law does not accord to the general public. They have the right to lay down and to maintain their grooved rails upon the public streets, and to use these rails for the passage of their tramway cars, to which, seeing that they cannot be deviated from the track, other vehicles meeting or passing must give precedence. But the respondents' use of their track is in no other sense exclusive. Any other vehicle, which does not run on flanged wheels, may use the track and the rails as freely as any other part of the street, whenever and so long as these are not actually occupied by the respondents' cars. Beyond the possession of these privileges, which are all that the statutes confer upon them, the respondents are in no better position, and have no higher right, than the appellant and other persons who use the public highway.

The respondents' next proposition was that, even if the operations complained of have not been expressly licensed by the statutes, they are sanctioned by implication, because they are necessary in order to the efficient carrying out of the purposes for which the respondents were incorporated by the Legislature. It was argued that tramway undertakings are authorized by the Legislature in the interest and for the accommodation of a large class of the community, who would be

deprived of that accommodation, at times when they most require it, if the respondents were prevented from using the only means by which they can keep their tracks open, and maintain a regular tramcar service during times of snow. The answer to that argument appears to me to be obvious and conclusive. In the first place, the statutes give the respondents no right to create a nuisance, and they have no such right at common law. In the second place, it is not shewn that the nuisance complained of is in any sense necessary. Whilst I have little doubt that there may be other methods equally effective, I think the evidence very strongly suggests that the use of salt is involved in the only known methods which combine cheapness with efficiency. The experience of other cities appears to me to point to that result. But the same experience clearly demonstrates that salt may be effectively employed without occasioning a nuisance. Its injurious consequences may be obviated by the simple expedient of removing from the street, immediately or within a reasonably short time after the application of salt, both the snow and the brine which transforms it into slush. It would, in my opinion, be extravagant to suggest that what can be done and is done, either by the street authority or by the combined action of that authority and the tramway company, in Edinburgh, Glasgow, and Dundee, becomes an impossibility in the city of Aberdeen.

In the next branch of their argument the respondents accepted, but without admitting, the foregoing conclusion, their object being to shift the origin of the nuisance from themselves to the town council of Aberdeen. They maintained, upon that footing, that their use of salt does not necessarily lead to a nuisance, and that any nuisance which may thereby be created is entirely due to the fact that, after salt has been applied, the briny slush which it produces, and the snow which it may come in course of time to affect, are not removed with sufficient expedition. If they were, no injurious consequences would follow. Then it was maintained that the duty of removal rested with the town council as the street authority, and that they were chargeable with the creation of the nuisance, which resulted from their want of alacrity in the

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY. Lord Watson.

performance of their statutory duty. I see no reason to doubt that the town council, as constituting the road authority, are charged with the removal of snow from the streets under their jurisdiction whenever the fall is so heavy as to obstruct traffic; but I am unable to come to the conclusion that their dilatoriness in the performance of that duty will relieve the respondents of responsibility for the consequences of their own operations. The nuisance is ultimately and mainly due to the employment of salt, which is used by them and not by the town council. If they choose to employ means which, if certain precautions are not observed, will lead to nuisance, they must first ensure that these precautions will be taken. The town council are under no obligation, statutory or otherwise, to counteract the illegal proceedings of the respondents, and it is by no means clear that their delay in removing snow would create any nuisance; whilst it seems certain that, if it had that effect, the nuisance would be of a character different from and less aggravated than that which is complained of.

The last proposition submitted on behalf of the respondents is formulated by the second branch of the fourth reason in their appeal case, which is as follows: "Because the operations of the respondents are in themselves legal, and are sanctioned by the street-cleansing authority." In the record there is not to be found either a statement of fact, or even a plea in law, calculated to raise the latter contention. The practice, which is becoming too common, of submitting for the consideration of this House points of controversy involving matters of fact, which have neither been pleaded nor sent to proof in the Court below, is not a commendable one. In the present instance the respondents have this excuse to offer—that the fact of the town council having either authorized or acquiesced in these operations, although it was neither pleaded nor remitted to probation, has been accepted and relied on both by the Lord Ordinary and by the Second Division of the Court, upon evidence which was not directed to the point.

The Lord Ordinary (Lord Low), after intimating an opinion that what the respondents have done "is to clear a part of the streets of snow with the acquiescence and approval of the

town council," comes ultimately to the conclusion "that it is sufficient for the decision of this case that the town council have come to be of opinion—and I see no reason to doubt that the opinion has been formed honestly and after due consideration—that it is, upon the whole, in the public interest that the respondents should be allowed to do a part of the work of clearing the streets, by sending the snow-ploughs along the tramway lines, and melting the snow not removed by the ploughs by means of salt. And that that view is not an unreasonable one is, I think, shewn by the fact that the same practice is adopted in Edinburgh, Glasgow, and Dundee." His Lordship omits to notice, that the practice of clearing snow from tramway rails which is followed in Aberdeen differs from that which obtains in Edinburgh, Glasgow, and Dundee in this essential respect—that in these cities it is carried on under conditions which practically obviate all risk of nuisance.

In like manner, the Lord Justice-Clerk, who delivered the opinion of the Second Division, consisting of himself, with Lords Young and Trayner, observed: "If we were here to express our own opinions as to the propriety of using salt upon the streets, I for one would have very little difficulty in expressing my opinion most emphatically against such a proposition. But we are dealing here also with what is done necessarily under the sanction of the public authority of the place; and if they are of opinion that the only reasonable way of getting the street cleared so as to allow that traffic which Parliament has sanctioned to be kept in operation, I do not think we are the judges at all of whether they are right in that matter or not." Again, in the same connection, his Lordship said: "They" (i.e., the town council) "have the responsibility and duty imposed upon them by the ratepayers of seeing that the roads are properly managed in all circumstances to the best of their ability. If the inhabitants of Aberdeen are of opinion that their affairs in that matter are being mismanaged by the corporation they have the remedy in their own hands." The last remark is hardly to the point. The streets of Aberdeen are open to all the inhabitants of the realm, who have the same rights of user as the ratepayers themselves; and it is not a

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY. Lord Watson.

matter of course that the persons aggrieved by a nuisance must be municipal electors.

I am unable to concur either in the law which seems to be laid down in these opinions, or in the facts which they assume. So far as the law is concerned, I entertain no doubt that the road authority are invested with large discretionary powers in regard to such matters as the cleaning of the streets and the regulation of traffic upon them, and that a Court of Law would decline to interfere with the due exercise of their discretion. But, in my opinion, in the case of a nuisance which the Legislature has not sanctioned, either expressly or by necessary implication, the road authority have no power or discretion either to commit it themselves or to authorize its commission by others. As regards the question of fact, an examination of those parts of the evidence which can be said to have any bearing upon it has satisfied me that the town council have not acquiesced in, and have not authorized, the operations complained of.

In dealing with these questions of acquiescence and authority, it is necessary to keep in view that the respondents have all along asserted, and in this suit are still maintaining, their statutory right to do the acts complained of, irrespective of any licence from the street authority. So far back as February, 1886, the town council, acting upon the advice of counsel and the report of a sub-committee, intimated to the respondents that their operations, in so far as they consisted of sprinkling salt upon their track in times of snow and in clearing their rails by heaping the snow on either side of the track, "were unwarrantable and illegal," and requested that they should discontinue those proceedings in the future. That intimation was never withdrawn; and the only answer which appears to have been sent to it was one or two letters of remonstrance, accompanied with a number of communications received by the respondents in reply to a circular addressed by them to the secretaries of various tramway companies throughout the country, all of which vindicate the practice of salting, and some of which go so far as to impeach the right of the road authority to interfere with it.

The respondents, in September, 1895, sent to the town council a copy of the record in this action, which had been closed on May 18, 1895, together with a request that the council should nominate representatives "to give evidence supporting the conduct of the tramway company." The council remitted the matter to their Streets and Roads Committee, upon receiving whose report they resolved—(1.) that such of their members as the respondents should select should give evidence, on behalf of the council, in favour of the tramway company; and (2.) that a committee be appointed to meet the officials of the company, and to report whether an arrangement could be effected "with the view of having the streets expeditiously cleared during snow-storms." I think the position which was taken up by the town council is perfectly intelligible. They were willing to enter into any reasonable arrangement for clearing away the snow and slush which would remove all cause of complaint by the appellant and others; but they at the same time thought it better that the respondents should maintain at their own hand, and at their own cost, the only plea which they had stated against the merits of the action. It is to my mind a very significant circumstance that, neither in their record nor in any of their communications with the town council, is there the slightest suggestion made of acquiescence or authority. The attitude of the council may savour of North Country caution; but it must be remembered that, if the respondents had succeeded in establishing their plea, the town council and the public would have been alike at their mercy.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and that the cause should be remitted to the Second Division of the Court, with directions to grant the appellant an interdict in the terms proposed by the Lord Chancellor. I also think that the appellant ought, as proposed by his Lordship, to have the costs of his appeal in this House, and also the costs in both Courts below.

LORD SHAND. My Lords, I also am of opinion that the appeal should be allowed in this case for the reasons which

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY. Lord Shand.

have been already so fully stated as to render it unnecessary for me to add more than a very few observations.

My Lords, I think it has been clearly proved as a matter of fact that a serious nuisance did exist and was caused by the respondent company during the winter of 1894–5 in Aberdeen, as complained of by Mr. Ogston. The learned counsel who appeared for the tramway company endeavoured to draw a distinction between the two operations of clearing away the snow from the parts of the street on which their rails were situated, and putting down salt on the street in such large quantities; but it is plain to me that those two operations must be taken together. The nuisance was created as the result of the combined operations, namely, the way in which the streets were cleared, and the quantity of salt placed on them. That nuisance might have been obviated if the snow and slush had been immediately removed, or removed within a reasonable time after the salt had been used. It is clear, I think, from the evidence in regard to other towns, that in Aberdeen the clearing of the streets has not been carried out with the promptitude and dispatch shewn elsewhere. If it had been there would have been an end to the complaint that is made here, and a complete answer to the action. I see no reason to doubt that the nuisance is not by any means one that must necessarily be caused and endured even in times of severe storm; and I cannot doubt that in future arrangements will be made by which any such nuisance will be obviated.

As to the other defence, that what was done had the sanction of the town council, I have to observe, referring to what has been so fully stated by my noble and learned friend Lord Watson, that in my opinion that defence is not made out in point of fact. I think the town council did not sanction the proceedings of the tramway company; but apart from that, I agree with the opinion which my noble friend has expressed, that even the town council themselves would not be entitled to continue and perpetuate a nuisance, and to defend themselves by saying that they were to be the judges in a matter of this kind. I think, even if the town council as administrators of the streets were causing a serious nuisance of this kind, that

the Court would have the power, and ought to exercise the power, of putting a stop to it.

LORD DAVEY. My Lords, I am of the same opinion. I confess to some feeling of sympathy with the tramway company. In a time of snow-storm such as that which occurred in 1894–95, there must of necessity be some inconvenience and suffering to men and horses, and the directors of a tramway company might easily conceive that their first duty was to keep the tramway open for public traffic, and to avoid the general inconvenience that would be occasioned to the public, particularly at that time, by the tram-cars ceasing to run.

But, my Lords, what we have to consider is whether the complainer is entitled to the rights which he claims, and whether the respondents have infringed the rights of the complainer. He is entitled to have his rights protected even if it were shewn that a majority of the public who use the tramways were benefited by the acts of the respondents.

My Lords, I cannot doubt that to pile up large heaps of snow on the highway was in excess of the respondents' rights, and was in law a nuisance. The tramway company had no more right to do this than any other inhabitant of the street would have had to pile heaps of snow on the tramway itself. In the same way with regard to the use of the salt: by the use of the salt in the manner in which it is proved in the evidence to have been used, the respondents produced a noxious mixture which they let loose upon the highway. That noxious mixture would not otherwise be there, and its presence, as I think is proved by the evidence, increased and aggravated to a material extent the inconvenience and danger to horses incident to the snow-storm itself.

My Lords, the only relevant defence that I can find pleaded is that the operations of the respondents in clearing and keeping clear their lines were within their statutory rights. I can only say that that argument depends on whether it was an incident necessary to the statutory rights conferred upon them. They have no statutory right to commit a nuisance; and the only attempt to make out or support that plea was by arguing

H. L. (Sc.) 1896 OGSTON v. ABERDEEN DISTRICT TRAMWAYS COMPANY. Lord Davey.

that the statutory power of maintaining their tramways necessarily involved (and I say "necessarily" deliberately) the creation of this nuisance; and that in fact the statute has, if not expressly yet impliedly, authorized the nuisance. My Lords, I do not think that that is made out in this case, and I do not think there are any grounds whatever by which the respondents can maintain that the operations which I have held to be a nuisance were sanctioned or permitted by their Acts.

My Lords, the respondents point to the analogy of what is done in other towns, and evidence upon this point seems to have impressed the Lord Ordinary. But, my Lords, I think it is impossible to read the evidence of Mr. Young as to what is done in Glasgow, and of Mr. Pitcairn as to how the streets are cleared in Edinburgh, without coming to the conclusion that the analogy is entirely against the respondents, and not in their favour. I observe that in Mr. Young's evidence he says, "We all knew what to do, and did it." It seems to me that that is exactly what did not take place at Aberdeen. And I observe that Mr. Pitcairn says, "We exercise more care now than we used to do." Well, my Lords, perhaps the experience of the past and the knowledge of what has been done in Edinburgh may have a salutary effect in Aberdeen in the future.

Now, my Lords, the Lord Ordinary and the Inner House seem to have thought that the case might be regarded for this purpose as if the town council had been the defenders or respondents. Indeed, the Lord Advocate and his learned junior, Sir Robert Reid, argued before us that the defenders were, in the operations complained of, agents of the town council, and that they acted by their authority. Now, I agree generally with the Lord Justice-Clerk's observations as to the amount of latitude and consideration to be shewn to a public body entrusted with the duty of clearing the streets. They are entitled to exercise their discretion as to the time, the order, and the means to be employed, and if they are supine in the exercise of their power, that is primarily a question to be considered by those who elect them to act on behalf of the

community. But, my Lords, the defenders are not the town council, and, in my opinion, they have wholly failed to shew any ground upon which they can shelter themselves under the powers and immunities of that body.

I need not refer again to the minutes of the town council or to the correspondence which passed between them and the tramway company which have been referred to by my noble and learned friend opposite (Lord Watson); but the effect left upon my mind is that, so far from acting under the authority of the town council, the town council, wisely perhaps, left them to fight their own action in the best way they could, and declined to interfere beyond permitting some of their body to give evidence. I do not see that they interfered at all, or intended to make themselves in any way responsible for the defence.

My Lords, in this state of things, if it were merely a temporary interference with the highway which came to an end with the state of circumstances which occasioned it, and if there were no claim of right to do the acts complained of, your Lordships would not probably think it was a case for granting an interdict; but by their fourth plea in law the respondents claim a statutory authority for their operations; and therefore I am of opinion that the appellant is entitled to the interdict he asks for; but, as it is quite possible that salt may be used for the purpose of clearing snow from the tramway (which cannot be so easily cleared by any other means) without occasioning a nuisance, I think the interdict should be in the qualified form proposed by your Lordships.

Ordered, that the interlocutors appealed from be reversed. And it is hereby declared that the appellant (complainer) is entitled to have the respondents, the Aberdeen District Tramways Company, interdicted, prohibited, and discharged from removing snow from their tramway lines in the Great Western Road, Holburn Street, Union Street, and George Street, in the city of Aberdeen, and from scattering salt

H. L. (Sc.)
1896
OGSTON
v.
ABERDEEN
DISTRICT
TRAMWAYS
COMPANY.

thereon, in the manner hitherto practised by them, to the nuisance of the appellant, and of the public using said streets for the purpose of traffic with horses: Further ordered, that the cause be remitted to the Second Division of the Court of Session, Scotland, to pronounce decree of interdict to the effect foresaid, and to find the appellant (complainer) entitled to the expenses of process hitherto incurred by him in the Court of Session: Further ordered, that the respondents do pay to the appellant his costs of the appeal to this House.

Lords' Journals, December 14, 1896.

Agents for appellant: *Grahames, Currey & Spens, for C. & P. H. Chalmers, Advocate, Aberdeen, and Auld & Macdonald W.S., Edinburgh.*

Agents for respondents: *Martin & Leslie, for L. M'Kinnon, Jr. & Son, Advocates, Aberdeen, and Morton, Smart & Macdonald, W.S., Edinburgh.*

[HOUSE OF LORDS.]

M'NAB . . . . . APPELLANT; H. L. (Sc.) 1896 Dec. 15.

AND

ROBERTSON AND OTHERS . . . . . RESPONDENTS.

Water—Diversion of Spring—"Stream"—Lease—Covenant.

Water percolating discontinuously through or along strata cannot be described as a "stream."

A lessor demised by lease a distillery, cottages, thirteen and a half acres of land, with two ponds, "together with right to the water in the said ponds and in the streams leading thereto." The lease also contained the usual warrandice clause. The lessor sunk a tank on ground outside but adjoining the demised subjects, and drew off from marshy ground percolating water which would have found its way eventually into one of the ponds:—

Held (Lord Halsbury L.C. dissenting), affirming the decision of the Second Division of the Court of Session, that water percolating through the ground towards the pond was not water in any stream leading to the pond:

Held, secondly, by the whole House, that, assuming an implied obligation on the part of the lessor not to diminish the water supply to the ponds, there had been no breach.

APPEAL from the Second Division of the Court of Session. (1)

The appellant, Alexander M'Nab, tenant of the distillery of Tambowie, New Kilpatrick, county Dumbarton, raised this action to have the respondents, G. M. Robertson and others, trustees of the late Sir George Campbell, interdicted from taking water from a certain spring which the appellant alleged formed part of subjects demised to his predecessor in title.

By lease dated 1889 the respondents let to Alexander Ferguson "all and whole the distillery of Tambowie, as presently occupied by David Chrystal, with the house occupied by the inland revenue officer and other two cottages adjoining for workpeople, the land extending to about thirteen and a half acres, and forming part of the fields marked 99 and 142 on the ordnance survey map, and with the two ponds marked Nos. 140 and 134 on the said map all lying, &c., ... together with

(1) 33 S. L. R. 497.

H. L. (Sc.) 1896 M'NAB v. ROBERTSON.

right to the water in the said ponds and in the streams leading thereto . . . . reserving the right to the first parties to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes; but declaring that any water returned by the tenant to the said ponds and to the streams leading thereto shall be returned in a pure state." Then followed a power to work mines, &c. That the lease was to be for thirty-one years from Whitsunday, 1889: "Providing and declaring always that the foresaid subjects are hereby let to the second party to be used and possessed by him for the purpose of carrying on the business of a distillery." Then followed the usual warrandice clause: "Which lease the first parties bind and oblige themselves to warrant to the second party from their own facts and deeds only." The lease was assigned to the appellant by Ferguson in April, 1891. A stream flowed from the hill above into the upper pond, through that pond, and down to the lower pond.

Prior to the commencement by the respondents of the operations complained of, there was a spring which rose about forty yards to the north of the place where the stream entered the lower pond; and in 1889 the water from this spring formed a marsh nearly close up to the lower pond, most of the water percolating through the marshy ground into the pond. This marshy ground was not let to the appellant. Other springs rising a few feet away appeared to have been carried by the lie of the ground in an opposite direction.

After the date of the lease the farmer of Tambowie put in a tiled drain to catch the spring, and at the end near the pond an iron pipe which conveyed the water into a tub placed at the edge of the pond. After the tub was put in a considerable amount of water found its way into the pond by percolation. In 1889 the output of the distillery was much smaller than it was at the date of the action; and there was not so much reason for economising the water which was wanted for cooling purposes. Particularly the output of the distillery was increased in 1893. In order to use up pot ale and other surplus productions of the distillery the appellant erected very extensive

piggeries. The sewage of the piggeries ran over the field and polluted the water supply of another tenant, a blacksmith, whose house was about 200 yards from the piggeries. This supply ran from the piggery field, and came apparently from the spring or a branch of the spring mentioned above. There was no stopcock on the blacksmith's supply, and the water ran to waste. The blacksmith complained of the bad water, and, after consultations and some correspondence, it was decided to use the water from the spring near the pond and to lead it past the distillery by the road and thus avoid the piggeries. The appellant protested. The operations complained of consisted of the collection by the respondents in a tank of the water of the spring situated on their own ground and outside the boundaries of the subjects, and the delivery of a supply of water by a pipe from this tank to Tambowie farm steading, to a cottage, and to the blacksmith's house, the property of the respondents. The tank which the respondents have erected was four feet cube, and has been placed on their own ground about forty feet from the pond. The spring, which is about fourteen feet above the tank, is brought into it by means of a drain, and from the tank a two-inch pipe conveys the water down. From this pipe a half-inch branch pipe is taken into the farmer's garden, a half-inch pipe into the cottage behind the blacksmith's house, and a three-quarter-inch pipe for the blacksmith's house. All these pipes are fitted with taps. The overflow from the tank finds its way into the tub by the pond by a three-inch conductor, and thence into the pond. When the respondents were putting in the tank the ground was opened up to what was supposed to be the blacksmith's previous water supply running to the smithy by the piggeries. This water was also led into the tank. It was alleged that this latter water which was thus diverted into the tank and by the overflow into the pond previously flowed away from it, and the result was claimed to be that the quantity of water going into the pond is as great as ever.

The Lord Ordinary (Low) found, on February 4, 1896, that the water of the spring situated on the banks of the lower pond was a stream leading into the pond within the meaning

H. L. (Sc.) 1896 M'Nab v. Robertson.

of the lease, although the water had not flowed into the pond by any definite or visible channel, but by percolation through marshy ground, and that the respondents had failed to prove that their operations had not diminished the supply to the pond; that the respondents were not entitled to interfere with the spring or to divert the water thereof; and that they were bound to remove the tank and restore the ground. This decision was recalled by the Second Division, who decided by interlocutor dated March 11, 1896, that the respondents were within their rights, and had not as a fact diminished the supply of water to the pond.

1896. Dec. 1, 3. *A. Graham Murray, L.A., Q.C.*, and *Cozens-Hardy, Q.C.* (with them *D. M. Abel*, of the Scottish Bar), for the appellant. It was of the utmost importance to the lessee to secure an adequate supply of water for the distillery; and the question in the present case depends upon the proper construction of the lease. The respondents argue that there are really two streams; but what they call two streams is only one stream, which in its course passes through the upper pond. The subject-matter of this appeal is a small stream coming down the mountain side which finds its way to pond No. 2. It is said this is mere percolating water; but that cannot be where, as here, the water issues up to the surface and causes a marsh. Such a body of water comes within the decision in *Whitehead* v. *Parks*. (1) The respondents have no right to take away a stream which they have granted, and to give the grantee another; and it is no answer to say that the substituted stream will give the appellant as good a supply of water: *Cowan* v. *Kinnaird*. (2)

[They also cited *Blair* v. *Hunter, Finlay & Co.* (3); *Chasemore* v. *Richards*. (4)]

Cripps, Q.C., and *Macfarlane* (of the Scottish Bar), for the respondents. The period before the tank was put in is important. There was no "stream" interfered with. There was simply marshy ground, and the water got into the pond by

(1) (1858) 2 H. & N. 870.
(2) (1865) 4 M. 236.
(3) (1870) 9 M. 204.
(4) (1857–9) 2 H. & N. 168; 7 H. L. C. 349.

percolation. Further, the site is not included in the demise. Therefore, if granted, the right claimed must fall within the words "with right to the water in the said ponds and in the streams leading thereto." These are words of limitation, and the grantee was content with the two ponds and the "streams" thereto. It need not be argued that the water from the marshy ground was an important source of supply. Again, the words "returning water" unpolluted "to the said ponds and streams" seem to apply to some streams in the natural meaning of the term. Sources of water percolating underground cannot be called streams. The case *Cowan* v. *Kinnaird* (1) had to do with the second part of the case, whether the implied obligation not to do anything to diminish the water supply had been broken. In that case the defendant substituted water from a stagnant pond for the water of the stream. In *Taylor* v. *Corporation of St. Helens* (2) the Master of the Rolls said: "A stream of water, in law, is water which runs in a defined course, so as to be capable of diversion, and it has been held the term does not include the percolation of water underground." You are to look at each grant, and not depart from the meaning of words; and here the grantee was willing to take these ponds and streams. It is not disputed that, if the appellant has a right to this water, the lessees have no right to give him other water.

On the second point, whether the landlord has done anything to impair what he has granted, the evidence is clear that the respondents have in no way diminished the water supply.

A. Graham Murray, L.A., Q.C., in reply, cited *Wheeldon* v. *Burrows* (3); *Suffield* v. *Brown.* (4)

Lord Watson. My Lords, the first question which it is necessary to consider in this appeal is whether the spring which the respondents have impounded by means of a tank was, at the date of the lease, connected with the lower pond by a flow of water constituting a stream or streams within the meaning of the lease. If it were, there would not appear to me to be any room for doubting that the operations of which the

(1) 4 M. 236.
(2) (1877) 6 Ch. D. p. 273.
(3) (1879) 12 Ch. D. 31.
(4) (1863) 4 D. J. & S. 185.

H. L. (Sc.) 1896 M'NAB v. ROBERTSON. Lord Watson.

appellant complains have encroached upon his legal rights as tenant.

According to my apprehension, the word "stream," in its primary and natural sense, denotes a body of water having, as such body, a continuous flow in one direction. It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream. And I may add that the insertion of a common rubble or other agricultural drain in these strata, whilst it tends to accelerate percolation, does not constitute a stream, as I understand that expression.

The spring in question, which is a very small one, is situated at a short distance from and above the level of the lower pond. There is little evidence, and that neither explicit nor altogether satisfactory, in regard to the condition of the spring and its effluents at and before the granting of the lease in September, 1889. Most of the witnesses speak to their condition after the operations of the agricultural tenant, which were subsequent to that date, and before the year 1892. But I am satisfied, upon the proof, that, whilst a small proportion of the water escaping from the spring may have gone in another direction, the bulk of its water must have gravitated towards the pond, and that a considerable proportion of it must ultimately have found its way into the pond.

Galbraith, the agricultural tenant, describes the land between the spring and the pond, before he commenced his operations, as a marsh which did not come quite close up to the side of the pond. He, in order to dry the soil, put a drain into the marshy part, which he continued by means of an iron pipe

three feet long to a tub sunk on the edge of the pond, from which he drew water for domestic use, and the overflow from which went into the pond. Lawson, who was assistant factor for the estate of Garscube, at the date of the lease, describes the intervening land as "soft spongy ground"; and there are other witnesses who describe the water as "seeping" from the adjacent land into the pond—a Scottish expression equivalent to "oozing"—which is an accurate description if applied to the escape of percolating water from the strata through which it has passed, and is to my mind altogether inconsistent with its running in a stream. Boyne, one of the appellant's witnesses, no doubt says that there was a sort of channel formed by the water from the spring; but he is the only person who appears to have detected it, and the bulk of the evidence upon the point, as well as the natural inference to be derived from facts established aliunde, alike lead me to the conclusion that, until the time of Galbraith's operation, the water of the spring reached the pond by the natural process of percolation, and that no part of the supply derived from the spring flowed in a body which could with any degree of accuracy be described as a stream.

I therefore differ in opinion from the Lord Ordinary, who came to the conclusion that the water of the spring in question was one of the streams specifically let to the appellant. Had I been able to arrive at that result, I should not have thought it necessary to consider whether, by interfering with the spring, the respondents had injured the appellant's water supply. In that case, every drop of water which they took from the spring, otherwise than in the due exercise of their reserved right in connection with farm purposes, would have been an illegal diminution of the supply secured to the appellant by the terms of his lease.

The result of my opinion, so far as hitherto expressed, is that the waters of the spring in question were not demised to the appellant, subject to a reservation permitting a certain user of them to agricultural tenants, but remained with the respondents under their title as proprietors. The appellant, upon that view of the case, maintained alternatively that the respondents

H. L. (Sc.) 1896 M'NAB v. ROBERTSON. Lord Watson.

are under a contractual obligation to allow as much of the water of the unlet sources from which the pond is fed to continue to enter it as may be equivalent to the average of the water supply derived from these sources at the date of the lease; and in aid of that contention he relied upon the general principle of law—that the grantor of a right cannot himself do anything in derogation of his own grant. The application of that principle must depend upon the extent of the right which the tenant got under his lease, whether by demise or by contract. I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease. But any such implication is attended with difficulty in cases like the present, where certain sources of supply are specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied in the stipulations of the lease of 1889; but I am willing, for the purposes of this appeal, to assume its existence. Upon that assumption, it is incumbent upon the appellant to establish that the result of the respondents' operations has been to diminish the supply of water now finding its way from the spring into the pond, as compared with the supply which came from the same source at and before the date of the lease.

I think the necessary effect of Galbraith, the agricultural tenant's, operations, which were subsequent to the granting of the lease, was to convey the water of the spring more rapidly and more directly to the pond, and to prevent its dissipation in the soil or its evaporation. If so, their tendency would necessarily be to increase and not to lessen the quantity of water reaching the pond from the spring. The immediate effect of the respondents' operation which followed was to collect, as soon as they came to the surface, the whole waters issuing from the spring, including a proportion of them which had not previously gravitated towards the pond, and to make them available for transmission in undiminished volume. The water collected in the tank serves, in the first place, to supply a pipe, which is not used for agricultural purposes, and the remainder is directly conveyed by another pipe to the tub sunk by

Galbraith through which the water of the spring previously entered the pond. A comparison between the quantity of water which now runs over the tub and that which previously escaped from it must therefore afford the means of ascertaining whether there has been a diminution of the supply since the arrangement made by Galbraith was superseded.

The whole evidence which bears on the alleged diminution in the amount of the spring water which now enters the pond, as well as on the amount which entered it before the lease was granted, is, it may be necessarily, somewhat vague. In considering that evidence, it is, in my opinion, not immaterial to keep in view the fact that, in the time of his predecessors, the weekly output of the distillery never exceeded 1300 gallons of whiskey, whereas during the tenancy of the appellant it was increased to about 1700 gallons, which represents an addition of about 30 per cent. to the quantity of water used for distillery purposes at the date of the lease. I have also to observe that the scarcity of water in such an exceptional season as that of the year 1894 cannot throw much, if any, light, upon the average quantity derived from the spring at and before the date of the lease—a question which in the absence of more reliable data can, in my opinion, best be solved by ascertaining whether or not the overflow from the tub has been sensibly diminished since, and by reason of the respondents' operations. Upon that point there is conflicting evidence; but, on the whole, I prefer the testimony which is favourable to the respondents; and, in any view, I have no difficulty in holding that the appellant has failed to prove diminution.

For these reasons I am of opinion that the interlocutor appealed from ought to be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD SHAND. My Lords, I am also of opinion that this appeal fails and should be disallowed; and I agree with my noble and learned friend who has just spoken in thinking that the water of the spring in question which rises at a comparatively short distance from the pond to which the tenant has a right was not within the subjects which were let or demised by

H. L. (Sc.) 1896 M'NAB v. ROBERTSON. Lord Shand.

the lease. At the date of the lease, and before the operations either of the tenant, in making a short drain through the ground, or of the landlord at a later period, that water oozed or trickled from the spring into the ground between it and the pond, and lay in that marshy and spongy ground which was afterwards by drainage made of some use for agricultural purposes. It did not, I think, flow, in any proper sense of the term, towards the pond. The witnesses, speaking in Scottish terms, talk of it as water which "siped" or "seeped" down towards the pond; and in Jameson's Dictionary these words are thus described: "Siping or seeping means to ooze or distil very gently as liquids do through a cask which is not quite tight." It being the fact that the water merely oozed or percolated towards the pond through ground of that character, I turn to the lease to see whether such water was demised or let. The only words which are used in the lease are to be found on p. 39 of the printed case. What is there demised is the distillery as described, and the two ponds specially mentioned, together with "right to the water in the said ponds and in the streams leading thereto." The subjects of the lease appear to me, therefore, to be distinctly defined as being the water in the ponds and the water in the streams leading thereto. I am of opinion that water of the character which has been thus described cannot be regarded as water in any stream leading to the pond; I think that the term "streams" necessarily means flowing water, and not water which oozes from a piece of marshy ground, and that unless water flows more or less in a channel, and continuously, it cannot be described as water that flows in "streams" leading to the ponds.

There remains, however, the question whether, although the water is not included in the grant, there is not from the whole terms of the lease an implied obligation on the landlords that they shall not withdraw water which would naturally find its way into the ponds or streams, to an extent which would diminish the supply as it was at the time when the lease was granted, and I am disposed to hold that there is such an obligation implied. The purpose of the lease is the working of a distillery, which, of course, without a proper supply of water

could not be carried on. The ponds and streams are themselves directly leased; and, in addition, we find on p. 40 of the print there is an obligation on the landlord to "maintain the subjects hereby let, with the sluices, water supply, roads, and fences." It appears to me that although the water in question is not directly conveyed, there is an obligation here on the part of the landlords that they will not in any way diminish the water supply.

But, my Lords, assuming such an obligation to exist, this differs very materially in its legal effect from a lease in which the water itself is let. I agree in thinking, as the Lord Ordinary says, that "if the water of the spring was part of the subjects let to the complainer, primâ facie the respondents were not entitled to interfere with it in spite of the complainer's remonstrances, and the onus lies with them to shew that the complainer has not been prejudiced by their operations." But if the water is not so let the position of the parties is different. It then follows that the tenant is only entitled to complain and to have a remedy if he is able to prove that the landlords have diminished the water supply. This raises a question of fact for the consideration of the House; and in that question it appears to me that the onus is on the tenant, who founds on an obligation not to diminish the water supply. It lies on the tenant to prove that the water supply has been diminished. On that question I agree with my noble and learned friend that the tenant has failed to establish this averment.

The Lord Ordinary, in the elaborate judgment which he has delivered, has examined with great care and minuteness the evidence upon this subject. His Lordship, after going in detail over the statements made by the different witnesses, and expressing his views as to the weight to be attached to them, concludes in these terms: "The question upon the evidence is very narrow, but I have come to the conclusion that the respondents have failed to prove that by interfering with the spring they have not injured the complainer's water supply." He was then looking at the question with the onus lying upon the landlord according to his view, and all that he is able to say

H. L. (Sc.) 1896 M'Nab v. Robertson. Lord Shand.

in the result is not that there has been any diminution of the water, but that the landlords have failed to prove that by interfering with the spring they had not injured the water supply.

There are several considerations which are material upon the question of fact. It is to be kept in view that by the recent operations of the landlord which formed the occasion for interdict being applied for, there was a material addition made to the water that was turned towards the pond. From one spring which was close to the pond, the water, in so far as it did not remain in the intervening marshy ground, found its way to the pond; but there were smaller springs surrounding it, the water from which did not find its way to the pond, but in a totally different direction—in the direction of the blacksmith's house which is referred to in the proceedings. I am satisfied upon the evidence that there was a material addition made to the water sent towards the pond by the landlord's operations, for he included the springs to which I now refer. These were caught and inclosed with puddle so as to send the water to the pond.

There is no doubt a conflict of evidence as to the effect which the tank or cistern and pipe put in by the landlord had; but it appears to me that the weight of the evidence is with the landlords rather than with the tenant; at all events, I am satisfied that there is not proof on the part of the tenant sufficient to shew that there was a diminution of the water supply as the effect of the tank and pipe.

My Lords, I agree with my noble and learned friend in thinking that it is also not unimportant to observe that the operations of the distillery have been largely growing in recent years, requiring therefore a greater supply of water than was previously necessary. That circumstance may have induced some of those who were connected with the distillery to think that the water supply was somewhat diminished, when the truth was that it was rather the distillery's demands which were increased. I also agree in thinking that one cannot judge with any safety of the result of these operations from taking a very dry season, such as that of 1894, as a test for examination,

and on the whole I agree that the appellant has failed to prove that his water supply, as it was at the date of the lease, has been diminished by the landlord's operations.

LORD DAVEY. My Lords, I am also of opinion that the interlocutor of the Inner House should be affirmed.

The subjects demised are the distillery of Tambowie, with certain cottages and lands, and with the two ponds numbered 140 and 134 on the ordnance map, "together with right to the water in the said ponds and in the streams leading thereto." The first question is the construction of the lease. It appears that the land between the spring in question in this appeal and the lower pond was not included in the land demised to the distillery, and at the date of the lease it was just a marsh through which the water from the spring soaked and percolated, and some of it no doubt ultimately found its way into the pond. But the water did not flow from the spring in any defined or visible channel. The appellant contended that all the sources of supply to the pond, and, if I understood his counsel rightly, all the water which if left to itself would by gravitation find its way into the pond, were within the subjects demised. And the Lord Ordinary by his interlocutor found that the water of the spring was a stream leading into the pond within the meaning of the lease, although the said water did not flow into the pond by any definite or visible channel, but by percolation through marshy ground. I find myself unable to agree with the construction put upon the words of the lease by the Lord Ordinary. I think that the word "streams" in the lease is used in its ordinary dictionary sense, and means a rivulet or course of running water, and that neither the spring nor the water soaking or percolating through the marshy ground can with propriety be termed a "stream." I find no context in this instrument to induce me to put what I consider an unusual and inaccurate meaning upon that word. I agree with the opinion of Lord Trayner on this point.

But the lease contains a clause of warrandice against the facts and deeds of the lessors; and the appellant also relies on

H. L. (Sc.) 1896 M'NAB v. ROBERTSON. Lord Davey.

the well-known maxim—that a grantor may not derogate from his own grant. Like my noble and learned friend opposite, I have a difficulty in holding that, when certain feeders or sources of supply are expressly granted, the operation of the lease can be extended by implication so as to impose an additional burden or servitude on the grantor. But I will assume, without deciding, that there is in the present case an implied covenant that the lessors will not by their facts and deeds diminish the quantity of water in the streams or ponds, which, I think, is the most favourable way of stating the case for the appellant. Of course, if the spring and the water from it is in the demise, it is no defence to say, "We give you other water in compensation, and have not on the whole diminished your supply." The lessors on that hypothesis have no right to touch the spring at all. But if the rights of the appellant are in contract: or in implied covenant; the situation is entirely different. The burden is in that case upon him to prove breach of the covenant, or (in other words) to prove that he has suffered a material loss of water by the operations of the respondents. If the Lord Ordinary had thought that the burden of proof was in the appellant, I am not sure that he would have found in his favour on this point. But however that may be, I agree with Lord Young in the Court below, and with your Lordships who have already addressed the House, that on the evidence it is not proved that the respondents by their operations have diminished the water in the streams or ponds; and I agree with the interlocutor pronounced in the Inner House, and think the appeal should be dismissed with costs.

LORD HALSBURY L.C. My Lords, I regret to say I am unable to concur in the opinion which the majority of your Lordships entertain. I agree with the Lord Ordinary that "by the lease two ponds are let to the tenant 'together with right to the water in the said ponds and in the streams leading thereto.'" That the learned judge says in his opinion "includes as between lessor and lessee all the sources of supply of the ponds," and I am of that opinion. I think that the demise of the pond and

all streams leading thereto was intended to convey and did convey all sources of supply. Though it be true that the word "stream" in its more usual application does point to a definite stream within defined banks, I do not think it is confined to that meaning. We speak of a stream of tears flowing from the eyes, and we speak of blood streaming from a vein—I think we may well speak of "streams" in the plural as meaning water passing over the superficies of a plane—we may call such a flow of water a stream. I think that the root idea is water in motion from one place to another as distinguished from stagnant water. Each gush of water from this small spring formed a stream whether big or little, and whether under ground or over ground. I cannot think that any sound distinction can be made between the smallest rill which passes over ground or under ground, in its being a stream or a streamlet, or a rill or other little supply of water coming down, as these sources of supply are alleged to have come down, into the pond. But in this case, in order to get rid of the plural "streams," one has to make two heads of the same stream mean two streams—it is necessary to read the word "streams" in an unnatural sense. There is but one stream in the ordinary sense, and you must read that stream as being two streams, or at least more than one, by taking different parts of the same stream. So far as one can get any light from the nature of the thing, the subject-matter with which the parties were dealing, it appears to me that what the grantor intended to convey to the grantee, and what the grantee, who was a distiller, was getting, was every source of supply which it was possible to get by general words—it was intended that he should get all the water that could be conveyed to him by any general words.

I confess I think that the pollution by the grantee of the other sources of supply is irrelevant. I think the greater flow of water procured by the grantor at other times is irrelevant; and I regret to some extent the decision at which your Lordships have arrived, because I think it will tend to multiply words in every conveyance by the parties in future. If, however, the true construction of the grant be what your Lordships have

H. L. (Sc.) 1896

M'NAB v. ROBERTSON.

considered it to be, I should not differ or disagree from what in that case would be the rights of the parties.

Appeal dismissed with costs.

Lords' Journals, December 15, 1896.

Agents for appellant: *Flux, Thompson & Flux, for Gill & Pringle, W.S., Edinburgh.*

Agents for respondents: *Nicholson & Patterson, for Tait & Crichton, W.S., Edinburgh.*

[HOUSE OF LORDS.]

THE LORD ADVOCATE . . . . . APPELLANT; H. L. (Sc.)

AND 1897

FLEMING OR ROBERTSON AND ANOTHER RESPONDENTS. *Feb.* 18.

Revenue—Succession Duty—Policy of Insurance—The Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2; *The Customs and Inland Revenue Acts*, 1881, 1889, 44 & 45 *Vict. c.* 12, *s.* 38, *and* 52 & 53 *Vict. c.* 7, *s.* 11.

By gratuitous assignation dated 1883 a father assigned to his daughter policies of insurance on his own life on which for many years he had paid the premiums. From 1883 the premiums on the policies were paid solely by the daughter. The father died in 1890, and the daughter thereupon received the money due under the policies:—

Held, affirming the decision of the First Division of the Court of Session, that neither succession duty nor account duty was payable by the daughter.

APPEAL from a decision of the First Division of the Court of Session as the Court of Exchequer in Scotland. (1)

James Fleming, father of the respondent Mrs. Fleming or Robertson, died on February 18, 1890; he had acquired considerable means in business, but at his death it was alleged he left no estate, and no inventory or duty accounts were given up. On February 21, 1840, he had effected a policy on his own life for 300*l.* with the Scottish Equitable Life Assurance Society. On April 9, 1860, he acquired right by assignation to a policy of 250*l.* effected on his life by a third party with the same society, December 4, 1840. He kept up these policies, and regularly paid the premiums as they fell due until September 29, 1883. He then assigned both policies gratuitously to his daughter, the respondent, the wife of John Skinner Robertson, since deceased. The assignment was granted for "the love favour and affection which I have and bear to my daughter and for other causes and considerations." From September 29, 1883, the premiums were paid by the respondent, and on the decease of James Fleming she received from the society the

(1) 22 R. 568.

H. L. (Sc.) 1897 LORD ADVOCATE v. FLEMING.

principal sums contained in the policies, and the bonuses which had accrued.

On July 4, 1894, the Inland Revenue Commissioners, under s. 38 (1) of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889, demanded an account of the moneys received by the respondent under the policies, or of part of such moneys received by her in proportion to the premiums paid by James Fleming; and failing an account stamp duty, an alternative claim for succession duty was made on the respondent, based upon the Succession Duty Act, 1853 (2); and the respondent was accordingly called upon for an account of the moneys paid to her under the policies to which she became beneficially entitled on the death of her father through his assignation in her favour.

On December 12, 1894, the Lord Ordinary (Moncreiff) found that the moneys recovered by the respondent were liable to

(1) Sect. 38 of the Act of 1881 (44 & 45 Vict. c. 12) applies to various classes of property therein described. Then s. 11 of the Act of 1889 (52 & 53 Vict. c. 7) contains supplementary provisions, and in particular enacts that the charge under the said section, i.e., 38 of the Act of 1881, "Shall extend to money received under a policy of assurance effected by any person dying on or after the 1st day of June, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

(2) The material part of s. 2 of 16 & 17 Vict. c. 51, was as follows: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, . . . shall be deemed to have conferred a succession."

Sect. 17 of the Act was as follows: "No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured or between the insurers and any assignee of the assured; and no bond or contract made by any person bonâ fide for valuable consideration in money or money's worth for the payment of money or money's worth after the death of any other person shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made: but any disposition or devolution of the moneys payable under such policy bond or contract if otherwise such as in itself to create a succession within the provisions of this Act shall be deemed to confer a succession."

account duty in the proportion which the premiums paid thereon by James Fleming bore to the whole premiums paid on the policies. (1) On March 20, 1895, the First Division found

(1) THE LORD ORDINARY, having stated the facts, continued:—In the view which I take of the case it is only necessary to consider the Crown's claim under the first alternative conclusion, because I am of opinion that the enactment founded upon, namely, 52 & 53 Vict. c. 7, s. 11, sub-s. 1, was passed for the purpose of supplying what was felt to be a defect or omission in the Succession Duty Act of 1853. If the former enactment does not strike at the moneys received by the defender, I do not think that the Crown can recover under the Succession Duty Act of 1853.

It is quite settled that if a man absolutely divests himself of property during his lifetime, no claim for duty arises upon his death even although it may be perfectly clear that the object of the divestiture was to evade succession or legacy duty: *Lord Advocate* v. *Galloway*, (1884) 11 R. 541; and *Lord Advocate* v. *M'Court*, [1893] 20 R. 488. But a policy of life assurance is a peculiar species of property. Its proceeds are not receivable until after the death of the person whose life is insured; and it requires to be kept alive, and, if the premiums are not duly paid, the sum assured will not be paid. Therefore, when the holder of a policy of life assurance on his own life assigns it gratuitously to another, the assignee cannot, as in the case of other kinds of property which has been gifted, obtain the full benefit of the gift until the death of the person whose life is insured. No doubt he may use it as a fund of credit or he may sell it; but the same may be said of any irrevocable right of reversion. Again, he may surrender it if the rules of the insurance company permit of this. It remains that the full beneficial interest does not accrue until the death of the assignor.

I heard a very able argument from Mr. Anderson, to the effect that by assigning the policy and ceasing to pay the premiums, the holder truly divested himself of and lost all control of that asset to all effects and purposes; and had it not been for the express terms of s. 11, sub-s. 1, of 52 Vict. c. 7, I should have been disposed to sustain that argument. But it seems to me that that enactment was passed for the very purpose of subjecting gratuitous assignations of this kind to account duty.

The 38th section of the Customs and Inland Revenue Act, 1881, applies to three classes of property (*a*), (*b*), (*c*). The first, (*a*), strikes at property taken as donatio mortis causâ, or by voluntary disposition inter vivos which shall have not been transferred bonâ fide three months before the death of the deceased.

(*b*) Property in which a joint interest is retained by the grantor, so that the beneficial interest passes by survivorship to some other person on the death of the grantor.

And (*c*) to property in which a life interest is retained by the settlor, or the right to restore it to himself is reserved.

This section was amended by the Customs and Inland Revenue Act, 1889, s. 11. I observe, in passing, that the heading to ss. 10 and 11 is "Amendments of law as to succession duties and duties on accounts." Sect. 10 is confined to amendment of

H. L. (Sc.) 1897 LORD ADVOCATE v. FLEMING.

neither claim valid, recalled the Lord Ordinary's interlocutor, and assoilzied the respondent from the conclusions of the summons. (1)

---

the law as to succession duty. Sect. 11 amends the section of the Act of 1881 to which I have just referred. The leading objects of these amendments is to bring into the net other gifts and dispositions not covered in terms by the Act of 1881, in which, while professedly making an out-and-out gift, the grantor has reserved some kind of benefit or interest to himself, or where the gift was made shortly before death. Accordingly the three heads (*a*), (*b*), and (*c*) are supplemented to certain effects.

But there is an addition to the list. [His Lordship cited s. 11 of the Act of 1889: see n. ante.]

The question raised is whether the words "kept up for the donee" are confined to the period subsequent to assignation; in other words, whether if the assignor pays no premiums after assignation the proceeds of the policy escape duty, or whether the words embrace the period before assignation even if the assignor paid no further premiums. I am unable to give the words the restricted meaning contended for by the defender, because to do so would defeat the object of the statute by allowing the cases of gift or assignation in which the donee or assignee receives the fullest benefit to escape duty. For instance, according to their view the assignee of a paid-up policy would not pay duty. Or if the assignor died before another premium fell due no duty would be exigible from the assignee. Or, again, if a person who had kept up a policy on his own life for forty years assigned it intuitu mortis, and the assignee paid the only other premium upon it which was payable before the death of the assignor, no duty would be exigible. I think the reasonable construction of the section is that if the person whose life is insured gratuitously assigns the policy to another, and the latter thereafter pays the premiums, or some of them, it must be held that the policy was kept up for the assignee to the extent of the premiums paid by the assignor before or after the assignation; and that accordingly duty falls to be paid on the proceeds received according to the proportion which the premiums paid by the assignor bear to the total premiums, that representing, according to the test provided by the statute, the extent of the benefit which the assignee has derived from the assignor on the death of the latter. The words "kept up for the donee" are somewhat ambiguous, because it may be asked, how can a policy be kept up for the donee before the donation is made? But I think that their meaning is what I have stated, and I must give effect to it.

(1) LORD PRESIDENT [ROBERTSON]. The primary plea of the Crown, on record and in debate, is founded on the 11th section of the Customs and Inland Revenue Act, 1889. [His Lordship then stated the facts.]

These are the facts upon which the Crown maintains that this is a case in which the policies were partially kept up by the deceased, for the benefit of a donee, and accordingly that the charge extends to a part of the money received under each policy in proportion to the premiums paid by the deceased. The question in dispute is, whether the policies were partially kept up by the

Feb. 18. *A. Graham Murray, L.A.*, and *Sir R. B. Finlay, S.-G.* (with them *E. Charteris*), for the appellant.

deceased for the benefit of the defender.

It was conceded in argument by the defender that the section is not confined to the case in which the last premium before the death has been paid partly by the deceased and partly by a donee; that the section takes a longer retrospect and regards a series of premiums, some of which have been paid by the deceased and some by the donee. This view of the section is supported, if not compelled, by the use (in the section) of the plural "premiums"; and at all events it was common to both sides of the Bar.

There remains, however, the question whether the policy must be held to have been kept up by the late Mr. Fleming during the period previous to the assignation for the benefit of the defender. In the case of the one policy this means a period of forty-three years; in the case of the other, a period of twenty-three years. Now there is nothing whatever to shew that in point of fact the benefit of the defender was in Mr. Fleming's thoughts when he paid his premiums during all or any part of this period; and indeed the Crown have not thought it necessary to say when the lady came into existence. The argument of the Lord Advocate was that it was enough that in the end the resulting benefit was to the donee.

I cannot adopt this view. It gives no effect at all to the words "for the benefit of the donee," and reads the clause exactly as if they were not there. The section as it stands presupposes a donation, plainly intended, as by nomination, or already effected, as by assignation. There must be a donee designated in order that the keeping up of the policy may be held to be for his benefit. This, I think, is the fair reading of the section; and the result seems to be highly reasonable. Up to the time of the assignation the policies in question were absolutely the property of Mr. Fleming; and the moneys paid by him by way of premiums were applied simply towards creating or preserving an asset of his estate. If at the date of the assignation he chose to give that asset away, as he did absolutely, inter vivos, I can see no reason founded in the provisions of the Acts of 1881 and 1889 why any part of that gift should be charged with duty. I am therefore unable to agree with the Lord Ordinary.

In leaving this branch of the case it may be noted that the defenders did not maintain that the section founded on had no application to the second of the two policies, by reason that it was not effected by Mr. Fleming on his own life, but was effected by a third party.

The Crown's claim was alternatively rested on the 2nd and 17th sections of the Succession Duty Act, 1853. The argument was, and, looking to the terms of section 17, must be, that the assignation of these policies disposed of the moneys payable under them so as to create a succession within the provisions of the Act. Did the assignation, then, dispose of the moneys payable under the policies so as to create a succession? To take the case in hand, the assignation was in 1883, and the death in 1890. The assignation of itself gave no right to the moneys; it merely enabled the

H. L. (Sc.) 1897 LORD ADVOCATE v. FLEMING.

First, as to succession duty, the assignation by the father was a disposition by reason whereof the daughter became beneficially entitled to a sum of money, and this created a succession by virtue of the Succession Duty Act, 1853, ss. 2, 17. Suppose the deceased had said, "I will give you 100*l.* now"; or, "if you wait until my death you will get 1000*l.*" If the

---

defender, if she chose (as she did), herself to go on paying the premiums during the life of the assured, and so to acquire the moneys. I do not think, therefore, that the claim of the Crown under the Succession Duty Act, 1853, can be supported. Indeed, the manner in which that statute was made to work out according to the Crown's argument attests the unsoundness of that argument. Alive to the rather startling results of their claim to succession duty on a fund largely created by the alleged successor, the Crown have argued that succession duty might be paid on a part instead of on the whole. Now, the system of making account duty chargeable on a part of the sums in the policies in proportion to the premiums paid by the deceased was first introduced by the Act of 1889; and for the application of this proportional system to succession duty under the Act of 1853 I can discover no warrant whatever in that statute. I am aware that it is suggested in Mr. Hanson's book; but I think the suggestion is to be regarded as really a hint for future legislation, which was acted on in 1889.

LORD ADAM. I concur. I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence. To my mind that is a very clear proposition, and I therefore cannot agree with the Lord Ordinary. His view seems to be that from the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for some possible donee at some future time, although such a donee should never be thought of or come into existence at all. That is an untenable proposition. I think, therefore, with your Lordship, and differing in that view from the Lord Ordinary, that this clause only applies where a policy is wholly or partly kept up by the donor after the date of the assignation. Now, in this particular case it is the fact that this policy, since the date of the assignation, has never been kept up by the donor at all; the whole premiums have been paid by the donee, and therefore the case does not fall within the section.

As to the meaning of this latter part of the clause, the question how the proceeds of the policy are to be divided, where the premiums have been paid partly by the donor and partly by the donee, does not arise. If this matter had been open, I should rather have thought that it did not apply to the case where the premiums were paid successively by one and by the other, but to the case where both together mutually paid the premium. But that question does not arise here.

LORD KINNEAR concurred.

donee takes the 100*l.* at once no succession duty is payable; but if he chooses to wait until the death, then succession duty is payable.

[LORD HERSCHELL. The assignation gave no right of itself to receive a gift at the father's death, for the daughter might have let the policy drop, or might have realized it during his life.]

If a father gives a bond to his son payable on the father's death, that is a succession: *Attorney-General* v. *Yelverton* (1), *In re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (2), and *Attorney-General* v. *Abdy*. (3) The principle of these cases applies to the gratuitous assignment of a policy of assurance. If the premiums were fully paid it would be within the Act; so also if the last payment of the premium is alone required to complete.

[LORD SHAND. Such cases would require very careful consideration.]

It is said on the opposite side that the donee does not obtain an absolute right because she has to pay up the premiums; but the same might be said of a lease to commence on the death of the lessor and donor, provided certain acts of good husbandry were done. That would diminish the value of the succession, but it would not determine that there was no right of succession.

[On this point they also referred to *Fryer* v. *Morland*. (4)]

Secondly, as to account duty, s. 11 of the Act of 1889 applies. The policies are kept up for the benefit of the donee where the premiums are paid by the donor before the transfer; and what the father has given to the respondent is part of the property which subsequently matured.

[LORD HERSCHELL. But that he gave during his life.]

Shaw, Q.C., and *A. M. Anderson* (both of the Scottish Bar), for the respondents, were not called upon.

LORD HALSBURY L.C. It appears to me that in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again

(1) (1861) 7 H. & N. 306, 326.
(2) (1885) 15 Q. B. D. 441.
(3) (1862) 1 H. & C. 266.
(4) (1876) 3 Ch. D. 675.

H. L. (Sc.) 1897 LORD ADVOCATE v. FLEMING. Lord Halsbury L.C.

in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted.

This claim has been put in two ways. It appears to me to be susceptible of a very simple answer in respect of either of them.

The first question is whether it comes under the 2nd section of the Succession Duty Act, 1853. [His Lordship read the section as given above, p. 146, note (2).]

This policy of insurance has been in existence a considerable number of years. The person entitled ultimately to this money, herself in one sense created the property—that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable upon the death. She continued that for a period of seven years, and therefore, reading simply the words as they stand, I do not think she has "become beneficially entitled" "upon the death of any person": because she has become entitled by reason, among other things, of her own payments during the period of seven years; and it appears to me, under that section, in order to make this a "succession" we must introduce some words of this kind: "disposition of property by reason whereof *either partly or wholly* a person has become entitled." If those words were introduced, in a certain sense it is true that she did partly become entitled by reason of premiums previously paid, the policy effected and the assignment then made, supposing she continued to pay the premiums. But I find no such words in the statute, and I decline to do anything else than construe the words which I find there. I therefore am of opinion that under that part of the statute it is impossible to maintain the claim of the Crown on this first ground.

I then turn to the alternative claim, which is for account duty; and it appears to me that it is susceptible of an equally plain answer. I do not know that I can state it more plainly than Lord Adam has done. He says: "I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence." Here again, in order to apply the tax to the

particular case in dispute, one must introduce words into the statute such as, "for the benefit of any existing or future donee or person who may become a donee." I find no such words. Unless you introduce by construction those words into the statute it is impossible, as Lord Adam says, to understand how it could be kept up for the benefit of a donee when no donee was in existence; I agree with him. The Lord Ordinary's view seems to have been that the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for the benefit of some possible donee at a future time. That really is an essential condition of the construction contended for by the Crown, and I am unable to agree with that construction.

My Lords, under these circumstances I think that this appeal should be dismissed with costs and the interlocutors affirmed, and I move your Lordships accordingly.

LORD HERSCHELL. I am entirely of the same opinion.

The first question is whether the money payable under the policies was property to which the lady became entitled on the death of her father by reason of the disposition which he made when he assigned the policies to her. I do not intend to lay down any principle or to say anything applicable to any case but the one with which we are dealing. I shall solely consider whether that comes within the words of the enactment or not. In my opinion it does not. I do not think it is accurate to say that the sum payable by the insurance company became hers by reason of the disposition which her father made. It is admitted that the entire sum cannot be said to have become hers by reason of that disposition; she would never have got it but for the fact that the premiums continued to be paid upon the policy. Therefore the suggestion is that it must be split up into two portions, the one to be attributed to the payment of premiums by her father before the donation, the other to be attributed to the payment of premiums by her afterwards; and that, being so divided, upon the former of those sums the duty would be payable. I can find nothing in the words of the Act to warrant and give support to such a contention. For these

H. L. (Sc.) 1897 LORD ADVOCATE v. FLEMING. Lord Herschell.

reasons I think that the appeal entirely fails so far as the Succession Duty Act is concerned.

Then it is said that account duty is payable by virtue of the Act of 1881 and the 11th section of the Act of 1889. In order to bring the case within those statutes it is necessary to shew that the policy, the duty on the proceeds of which is in question, has been either "wholly kept up" "for the benefit of the donee"—which of course is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was "kept up for the benefit of the donee" at the time when payments were being made by the father of the lady, not for her benefit as far as appears, or for anybody's benefit but his own. The contention is that, because he afterwards creates a donee, the payment of premiums which he made, when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute but abusing them if we put such a construction upon them.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. My Lords, I am of the same opinion; and while quite concurring in what has fallen from your Lordships, I think the grounds of judgment have been very clearly and accurately stated by the learned Lord President and Lord Adam in the Court of Session.

Appeal dismissed with costs.

Lords' Journals, February 18, 1897.

Agents for appellant: *Francis F. Gore, Solicitor for England of the Board of Inland Revenue, for P. J. H. Grierson, Solicitor for Scotland of the Board of Inland Revenue.*

Agents for respondents: *Keeping & Gloag, for William Gunn, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

CHASTEY AND ANOTHER . . . . . APPELLANTS; H. L. (E.)

AND 1897

ACKLAND . . . . . RESPONDENT. *Feb.* 22.

Air—Right to uninterrupted current of Air—Stagnation of Air—Nuisance—Injunction.

THE plaintiffs having appealed from the decision of the Court of Appeal (1) the appeal was argued on February 18, 19, and 22 before Lord Halsbury L.C. and Lords Herschell, Macnaghten, Morris, and Shand by

H. E. Duke and *H. B. Edge* for the appellants; and *Cozens-Hardy Q.C.* and *J. A. Foote* for the respondent.

During the argument several of their Lordships expressed dissent from the reasoning and the decision of the Court of Appeal. In the course of the reply of the appellants' counsel Lord Halsbury L.C. observed that their Lordships might possibly grant a mandatory injunction, though not perhaps as to the whole of the buildings affected by the injunction granted by Cave J. The parties thereupon came to terms whereby the respondent, on condition that he should be allowed to maintain the buildings in question, agreed to pay to the appellants 300*l.* by way of damages, namely, 290*l.* in addition to the 10*l.* ordered to be paid by the Court of Appeal, with all costs here and below; the judgment of the Court of Appeal to be taken to be varied by consent accordingly.

Subsequently a petition for leave to withdraw the appeal upon these terms was presented by the appellants and consented to by the respondent; and it was ordered accordingly.

Solicitors for appellants: *Templeton & Cox, for G. Hirtzel, Exeter.*

Solicitors for respondent: *Torr, Gribble, Oddie & Sinclair, for Roberts & Andrews, Exeter.*

(1) [1895] 2 Ch. 389.

[HOUSE OF LORDS.]

H. L. (E.) 1897 Feb. 23.

FREDERICK BLOOMENTHAL . . . APPELLANT;

AND

JAMES FORD (THE LIQUIDATOR OF VEUVE MONNIER ET SES FILS, LIMITED) . . . RESPONDENT.

Company—Contributory—Allottee—Certificate that Shares are fully paid up—Estoppel.

The appellant lent money to a limited company upon the terms that he should have as collateral security fully paid shares in the company, and the company handed to the appellant certificates for 10,000 shares of 1*l.* each. The certificates stated that he was the registered holder of the shares, and that on each of them the full amount had been paid. No money had in fact been paid upon the shares, which were issued from the company direct to the appellant, but he did not know this and believed the representation that they were fully paid shares. An order having been made to wind up the company, the appellant was placed on the list of contributories:—

Held, that since the company had obtained the loan by a representation that the shares were fully paid, which the appellant believed and acted upon, the company and the liquidator were estopped from alleging that the shares were not fully paid, and that the appellant was entitled to have his name removed from the list of contributories.

The decision of the Court of Appeal, [1896] 2 Ch. 525, reversed.

THE company, Veuve Monnier et ses Fils, Limited, was registered in 1890 under the Companies Acts, as a company limited by shares. In February 1894 the appellant, a stationer in the city of London, who had supplied the company with stationery and printed for them, was asked to lend the company 1000*l.*, and verbally agreed with the secretary and the managing director to lend that sum upon the terms that he should have the company's acceptance for 1000*l.*, and as collateral security 10,000 of the company's fully paid shares of 1*l.* each, and that if the company should wish to pay off any part he should return a proportionate part of the shares. The appellant advanced the company 1000*l.*, and afterwards received a letter from the company enclosing the company's acceptance for 1000*l.*, and ten certificates. Each certificate stated that the appellant was

the registered proprietor of 1000 7 per cent. cumulative preference shares of 1*l.* each in the company, numbered —— to ——, and "that on each of such shares the full amount has been paid." In April 1894 the appellant made a further advance of 600*l.* and received 6000 shares under precisely similar circumstances. In November the company sold by auction 200 of the above shares at 17*s.* 6*d.* each. The appellant returned to the company one of the certificates, executed a transfer of the 200 shares to the purchaser, authorized the auctioneers to pay the purchase-money to the company, and received from the company 20*l.* in reduction of the loan. In 1895 the company was ordered to be wound up, and the appellant was placed by the liquidator on the list of contributories in respect of 16,000 shares. Upon the hearing before Vaughan Williams J. of an application by the appellant to strike his name out of the list, he was cross-examined upon his affidavit which related the facts above stated. He said that he did not know that the shares handed to him were part of the unissued shares for which the public had not applied, and that he always believed they were fully paid up until December 1894, when he was told by a friend that they were not; that he then gave notice of an application to remove his name from the register of shareholders, but the winding-up supervened.

The secretary was also called and said that the shares issued to the appellant were part of the company's unissued preference shares, that he did not know whether he told the appellant this, but that he assumed that the appellant understood it.

Vaughan Williams J. refused the application, and this decision was affirmed by the Court of Appeal (Lindley, Lopes and Rigby L.JJ.). (1)

From these decisions the present appeal was brought.

Feb. 22, 23. *Sir R. T. Reid Q.C.* and *Astbury Q.C.* (*Mark L. Romer* with them) for the appellant. This is a case of estoppel at common law. The company induced the appellant to lend them money by the representation that he should have

(1) [1896] 2 Ch. 525.

H. L. (E.) 1897 BLOOMENTHAL v. FORD.

as collateral security fully paid-up shares, and they sent him certificates stating that on each of the shares the full amount had been paid. The appellant believed the representation and acted upon it; therefore neither the company nor the liquidator (who is in no better position than the company) can be heard to say that the shares were not fully paid. The appellant was not bound to make any further inquiries into the facts, and he did not; he relied implicitly on the statement of the company and the certificates, and it is not open to the company to say that he ought to have suspected the truth and bona fides of the representation. Even if the appellant had known that he was the original allottee, it would still be a case of estoppel. The doctrine of *Burkinshaw* v. *Nicolls* (1), as to a transferee of shares who takes them on the faith of the certificates that the shares are fully paid, and in ignorance of the fact that they are not, has been extended to the case of an original allottee in *Parbury's Case*. (2) This was recognised in the Court of Appeal, but some of the judges seem to have thought that although the appellant did believe the representation he ought not to have believed it. It is true that a company cannot issue shares at a discount: *Ooregum, &c., Co.* v. *Roper* (3); that there was no registered contract to satisfy s. 25 of the Companies Act 1867, and that every one is supposed to know the law. But these considerations are irrelevant if (as the evidence shews) the appellant believed the representation. Even if he had been credulous and foolish that would not affect the doctrine of estoppel: it is only a question of evidence as to the belief. But in fact there were no grounds for suspicion. The appellant made no application for allotment, and any entry made in the company's books to that effect would be false. He may well have thought—if he thought about it at all—that they were shares originally allotted to some one else, and were fully paid up. It is clear that no one intended him to be treated otherwise than as a secured creditor. The appellant's case does not depend upon the equitable doctrine of a purchaser for value without notice:

(1) (1878) 3 App. Cas. 1004. (2) [1896] 1 Ch. 100.
(3) [1892] A. C. 125.

it turns upon the law established by *Pickard* v. *Sears* (1), and *Freeman* v. *Cooke* (2), and other cases, that a man is estopped from denying the truth of a statement made to another with the intention that the latter shall act upon it, and in fact believed and acted upon by him. The case of *Ex parte Sandys* (3), mainly relied on by the respondents in the Court of Appeal, is quite different: there was no misrepresentation of fact.

Independently of estoppel, the only contract upon which a man can be made a contributory is the contract upon which he agreed to take the shares: *Waterhouse* v. *Jamieson*. (4) The appellant did not agree to become a member of the company except in respect of fully paid shares, and is therefore not liable in respect of shares of a different class.

Eve Q.C. and *Martelli* for the respondent. This is not a case of estoppel, but rather one of common mistake from which the appellant must suffer. The evidence shews that the appellant was well acquainted with the usual method of issuing such shares, and that he knew these were part of the company's unissued shares, that he was the original allottee, and not the transferee, and that he was registered. Even if he did not fully realize all the effect of these facts, he was put upon inquiry, and he cannot shelter himself under an ignorance of the law. There never was any suggestion that anybody but the company had the slightest interest in the shares, and the appellant does not say he thought anybody had. Vaughan Williams J. held that the appellant knew all the facts and was fully aware that the shares were part of the unissued capital of the company. He was not deceived as to any fact, though he may have been deceived as to the power of the company to issue fully paid-up shares. Until the hearing before the Court of Appeal there was no suggestion that money had ever been paid, the only understanding was that there was no liability. It is not true to say that the liquidator cannot be in a better position than the company. The liquidator represents the

(1) (1837) 6 A. & E. 469.
(2) (1848) 2 Ex. 654.
(3) (1889) 42 Ch. D. 98.
(4) (1870) L. R. 2 H. L., Sc. 29, 33.

H. L. (E.) 1897 BLOOMENTHAL v. FORD.

creditors, and the appellant, being in possession of facts from which he must have, or ought to have, inferred the truth, though as against the company he might have rescinded the contract, cannot do so against the liquidator to the detriment of creditors. The representation on which he lent the money was not so explicit as the statement in the certificates: he did not lend his money upon the faith of the latter statement. What he really believed was that there was no liability upon the shares, not that any money had in fact been paid upon them.

LORD HALSBURY L.C. My Lords, in this case I should have felt very great regret indeed if I had been compelled to affirm the judgments which have been appealed against. I think I can hardly imagine a greater scandal to the administration of justice than would be involved in affirming that a person could be treated with such grievous injustice as would have been inflicted upon the appellant here if those judgments had been affirmed. With the greatest possible respect to all the learned judges who have taken part in this discussion, it appears to me that they have all been affected by the circumstances of the case, which they describe as circumstances of great hardship. For my own part, I am unable quite to follow that view. It seems to me that it is a somewhat illogical view. If the appellant here was, as some of their Lordships seem to think, put upon an inquiry, or, as some others of them seem to think, actually knew the true condition of things, he is not an object of sympathy at all; he has simply entered into an adventure in which he has been unfortunate, and he must take the consequences of his own rashness. I should sympathise with him very much if I thought this judgment could be affirmed, because I should regard him as being a person who had been "entrapped"—which I think is the phrase that is used in one of the judgments, or had "fallen into a pitfall," which is the phrase used in another judgment—by those persons who have got his money by a misrepresentation (whether a wilful misrepresentation or not it is immaterial to inquire), and, they having got his money, he is called upon not only to lose the money, but to

incur an enormous liability, which to most persons (I do not know whether to him or not) would be absolute ruin.

The narrative is a very short one. A company, of which he is the stationer, is in want of money, and they apply to him to lend the money, and they promise to give him, as security for the money he lends, "fully paid-up shares." I shall say a word in a minute as to what that phrase means. That is what they promise to give him, and, relying upon that promise, he lends them 1000*l.* Afterwards the same process is renewed (I do not think anything really turns upon any difference in the terms), and he lends 600*l.* more. Then the company is wound up, and he finds himself made responsible for 16,000*l.* My Lords, I cannot imagine a more pitiable narrative, if it were possible in point of law to establish the claim against him to that extent.

My Lords, I am of opinion that no such claim can be established against him, because it appears to me that the company who obtained his money upon the distinct representation that what they were about to give him were "fully paid-up shares," obtained it by a misrepresentation of a fact which he had a right to believe and act upon, and in my view he did believe and did act upon, and parted with his money upon the belief that he had got that security. My Lords, it appears to me that it is hopeless to contend that, after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say, "You should have inquired. You should have observed certain circumstances; and if you had done that you would have been better advised than to advance the money, because you would have known that 'fully paid-up shares' did not mean what the words themselves signify, but meant that no further liability should be insisted upon in respect of them." I suppose if one is to expand the meaning of these words in the sense which the respondent now insists upon, one must say that that is what they substantially mean, namely, that there is to be no liability upon the shares, and we will not call upon you to supply anything further to the funds of the company upon them.

Now, the ground upon which that is suggested appears to be

H. L. (E.) 1897

BLOOMENTHAL v. FORD.

Lord Halsbury L.C.

partly a question of law and partly a question of fact. As to the question of law, I confess for myself I entertain a doubt whether it is ever true, in a case where one person has been induced to act by the misrepresentation of another, that you can go beyond the fact whether it is so or not. In arriving at a conclusion upon this question of fact, like every other question of fact, all the circumstances must be considered. A statement may be made so preposterous in its nature that nobody could believe that any one was misled, and in considering these questions, as in *Freeman* v. *Cooke* (1) and other cases which might be cited on the subject, the learned judges discussing questions of fact together with questions of law not unnaturally sometimes point to this or that circumstance as being a circumstance from which people would naturally infer that a man did not believe what he professed to believe; but once the conclusion is arrived at that the belief was induced, and intentionally induced, by a misstatement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books in which it has been suggested that the legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say, "I told you so-and-so; but you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool." I do not believe that any such case can be brought forward, or that there is any authority for such a proposition.

Now, my Lords, dealing with it as a question of fact, and there being no other question of law to be disposed of, I come to an exactly opposite conclusion from that which the learned judges in the Court below have arrived at. The circumstances are simple; they speak for themselves: res ipsa loquitur. Here is a company, which is not too flush of money, applying to their stationer and printer for a loan of money. Can anybody believe that if he had known the true state of the facts, namely, that instead of getting a security he was getting a liability to the extent of 16,000*l*., he would have lent the

(1) 2 Ex. 654.

money? Then why am I to go out of the natural and ordinary meaning of those phrases which were used between the parties? He agrees to give a loan if he gets "fully paid-up shares." Now, what is the meaning of "fully paid-up shares"? I admit, though I am not at all certain that the admission does not go a good deal beyond what has been proved as a fact, that occasionally the phrase "fully paid-up shares" may be used somewhat colloquially and loosely as meaning shares upon which no further liability can be enforced by the company. I will take that so for the sake of argument. But what then? Why am I to cut down and override the natural meaning of the words by suggesting that there were facts in this case which would have led this gentleman to come to that conclusion? When I look at what was the original contract between the parties, what they were doing, and what they were discussing, and when I look at the language used, it seems to me that it certainly lies upon the persons who insist upon giving an unnatural meaning to the words "fully paid-up shares" to establish that proposition.

My Lords, I confess for myself I am unable to see one single particle of evidence which suggests it. The words used in the original contract are, as I have said, "fully paid-up shares." The language of the certificate is this—that Mr. Frederick Bloomenthal "is the registered proprietor," and so on, of such and such shares, "and that on each of such shares the full amount has been paid"—that is the certificate issued by the company itself. Upon what possible ground can they suggest, "You ought not to have believed that statement; you ought to have believed that it was only an arrangement that the company were issuing their own shares"? The argument in the Courts below appears to have turned upon what, I venture to suggest, is a mistake. It was said, "That could not be true"; but it could be true. It cannot be denied that there are some circumstances under which shares, although in the possession and under the dominion and control of the company itself, are shares which have been fully paid up either by means of actual money or by means of such matters registered under the Companies Acts as would have made them fully paid-up shares.

H. L. (E.) 1897 BLOOMENTHAL v. FORD. Lord Halsbury L.C.

And I am asked to assume that because this was the stationer of the company (for that appears to be the argument on this part of the case) he must have known that these were not fully paid-up shares in that sense, and that they could not be. My Lords, it is enough to say, in answer to that argument, that they could be. There are one or two hypotheses on which they could be. One is the suggestion of vendors' shares. Another is that a shareholder who had taken shares in the company might be desirous of helping the company to borrow money upon the shares he had taken. One need not go into any other hypothesis, because the logical force of the argument must go to this extent—that they could not be fully paid up; if they could be it fails. So far therefore as the proposition which was insisted upon in the Court of Appeal is concerned, my answer is, I am bound to take the language of the parties unless the facts shew that it was not used in its proper and natural sense—in the sense it would bear to any ordinary mind.

Now that being the state of facts, what is the evidence of the gentleman himself, as to whom it may be truly said that all the judges—perhaps Vaughan Williams J. may be an exception, but certainly all the judges in the Court of Appeal—seemed to assume that he was not juggling with the facts, but that he was intending to tell the truth? His statement is unequivocal: he thought that they were fully paid-up shares. I know the sort of gloss that has been put upon that statement. It is said he must have understood something different from what the words signify. I have already dealt with the logical argument upon that subject, but, speaking of it as a popular phrase, I do not know why people should not mean what they say when they speak of fully paid-up shares. People who know anything about limited liability companies know that there is a certain liability upon their shares, and that from time to time the company calls up such and such a proportion of the money due upon those shares, and I should have thought, without being a lawyer or discussing questions which have been raised in the courts, that a person would ordinarily understand that fully paid-up shares mean shares upon which the whole amount that could be called up had been called up. That is the mean-

ing of "fully paid-up shares," and in strictness it is the only meaning that could be applied to that phrase.

Then, my Lords, this case appears to have been started by the liquidator under the impression that this gentleman had received express notice of the actual state of things, and I think one of the learned judges says in terms that it was not a question of constructive notice, but that he had received express notice. All I can say is that the appellant himself absolutely denies it, and he is not cross-examined in any sense which in my opinion ought to shake his evidence: his bona fides has at least been affirmed by three judges. And then when one looks at the other side, how is he contradicted? I think there is no real contradiction at all. The first witness who was called says that he assumed he knew what was meant, but that he will not undertake to say that he ever said a word about it. With that exception the evidence of the appellant goes uncontradicted—that he did not know, and had no reason to know, that the representation made to him was not perfectly true.

If that is the state of the facts at which one arrives in considering the evidence in this case, the legal conclusion cannot be doubted. There is a long series of cases, no one of which it is important to quote, because the proposition of law has never been doubted, so far as I am aware, that if you induce a man to act upon a statement of yours, meaning him to act upon it, and that statement is untrue, and he does act upon it because he believes it, it is not competent then for the person who has made the representation to say afterwards, "I will shew another state of facts than that which I represented, and you ought not to have believed it." My Lords, I believe no such proposition can be affirmed upon any authority, and it would be a very lamentable thing indeed for the course of business—and indeed for the course of human life—if the law did not recognise the responsibility of persons who make statements and induce others to act upon them, so that they should not afterwards be permitted to turn round and say that what they stated was untrue, having altered the position of those whom they deceived by the statements they made.

H. L. (E.) 1897 BLOOMENTHAL v. FORD.

Under those circumstances I move your Lordships that the appeal be allowed, and that the respondent do pay to the appellant the costs both here and below.

LORD HERSCHELL. My Lords, I am of the same opinion.

In differing, as I do with all respect, from the learned judges in the Court below, I do not think that I am differing from them upon any question of law. The doctrine of estoppel to which my noble and learned friend has alluded appears to be entirely admitted by the learned judges in the Court of Appeal. The decision against the appellant has arisen from the conclusion that the doctrine of estoppel does not apply in the present case so as to preclude the company, or the liquidator representing the company, from contending that the liability upon these shares exists.

Now, this is not the case of an application to a company by a member of the public for an allotment of shares and the acceptance of an allotment under the impression that it created no liability, when in truth according to law it did create a liability. The transaction was one of loan to the company, and for that loan the company were to give as security "fully paid-up shares." I do not think it can be doubted that the company represented to the appellant that the shares which they were handing to him, by means of the certificate, in return for his loan, and which he was to receive as security, were fully paid-up shares. On the meaning of those words I shall have something to say in a moment. That he acted upon that representation there can equally be no doubt. He was not content to lend his money without security. The security which he bargained for and was to receive was the security of "fully paid-up shares." The money was lent, and under those circumstances, if the representation in the sense in which it would be naturally understood and was understood by the appellant was untrue, then all the elements of an estoppel appear to me to be present.

In more than one of the judgments in the Court below it was said that the question was whether the appellant was a bonâ fide purchaser or transferee of those shares for value with-

out notice of the state of things which existed. I do not myself think that that is an element which it is necessary to consider. The doctrine of estoppel is a common law doctrine, and needs no assistance from the equitable doctrine of bonâ fide purchasers for value without notice. And more than that, I think there is a tendency perhaps to mislead—to draw the consideration away from the true questions at issue—when we begin to talk of "purchasers for value without notice." It is not to my mind a question of notice at all.

Now, the statement having been made that he was to receive "fully paid-up shares" in exchange for his money, he gets a certificate, on the face of which it is stated that on each of such shares the full amount has been paid. It was argued by Mr. Martelli that the money was parted with by the appellant on the faith of the statement that the shares were fully paid up, and that he could not rely upon the form of words to be found in the certificate, which it is said is more explicit and unequivocal. I do not think that in any case that contention could be maintained, because, although it is quite true that he parted with his money in exchange for this certificate, and lent the money before he actually got the certificate, yet the loan in the first instance was only for a limited period. A bill was given which fell due in the month of August, and that bill was renewed, and he most assuredly acted upon representations he had received prior to that time, or the effect produced by them, by leaving his money, as he was not bound to do, for a considerable time after that, as a loan to the company. This bill was renewed in the month of November. I suppose it had been renewed at an earlier date for the first time; but at all events, it is stated in the affidavit that both bills were renewed in the month of November. Therefore, I do not think there is anything in the point sought to be made that you are not entitled to look at the certificate as part of the inducement by the company to let them have or retain his money; at all events, the certificate can be looked at for the purpose of seeing what was the meaning or what was regarded as the meaning of "fully paid-up shares," because the representation to him having been that the shares he was to get were

H. L. (E.) 1897 BLOOMENTHAL v. FORD. Lord Herschell.

fully paid up, the certificate distinctly and unequivocally represents that on each of them the full amount had been paid. Now, in point of fact they were not fully paid up—they were not paid up at all—and he is sought to be made liable for the whole amount.

It is said that he is under this liability, and that the law of estoppel does not apply, because if he had thought the matter out, if he had put two and two together, if he had reflected on the circumstances, he would have seen and must have seen that the shares were not fully paid up. My Lords, I cannot myself think that, where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, there is no estoppel. But supposing he did believe it and did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, "If you had thought more about it you would have seen it was not true." The very person who makes a statement of that sort has put the other party off making further inquiry. He has produced on his mind an impression as a result of which further inquiry is thought to be unnecessary or useless. Therefore I confess I do not think that it is legitimate to speculate what is the conclusion at which a man would have arrived if he had put together—pieced together—all the considerations that might have occurred to a reflective mind cogitating on the whole subject, and then to say that because he would have come to the conclusion that the statement made to him could not have been true, he is not entitled to act upon it as if it had been true, when in point of fact he did not enter into those considerations, but did believe it and did act upon it.

Now, my Lords, on what grounds is it said that he could not have believed this, or ought not to have believed it? The case is put, as I understand it, in this way. It is said "fully paid-

up shares" is a term frequently used when the shares have not been fully paid up, as meaning shares which are to be treated as being fully paid up, and on which there is to be no further liability. I very much doubt whether those words, baldly used without anything further, by one party to another, would convey that meaning. No doubt under certain circumstances people may talk of shares on which nothing has been paid as "fully paid-up shares," because they are to be treated as such although there has been neither money nor money's worth given for them. I think that certainly would be a rare case; but whether people might so speak of it or not, it is not the natural ordinary meaning of "fully paid-up shares." It is not the primary idea that would be conveyed to anybody who was told he was to get fully paid-up shares.

But then it is said in this case the appellant must have known that he was getting these shares from the company; that if he got them from the company he was getting them as allottee from the company; that if he got them as allottee from the company he must have known that nobody could have paid the company, because they were then being for the first time allotted, and that as he had not paid upon them, nothing had been paid upon them; and under those circumstances he must have understood, if he had thought about it at all, that when they were spoken of as "fully paid up" the expression was used in the sense to which I have just alluded, and not as representing that they had really been paid up. My Lords, it seems to me that the learned judges in the Court below have overlooked the fact that a company might deal just as this company dealt with these shares, and in a manner consistent with every fact that exists in the present case, and that those shares might have been fully paid up. I will not go through all the cases that might be put. For example, there is the case, which is a very common one, of shares which are allotted to the vendors or their nominees: very often the names of the nominees of some of these vendors' shares are not given for a considerable time afterwards. It is not an uncommon thing to see a provision that the vendors shall not put their shares upon the market for a certain time. There is nothing impossible in a vendor coming

H. L. (E.) 1897 BLOOMENTHAL v. FORD. Lord Herschell.

to the assistance of a company which is in necessity and in whose prosperity he is so much interested, if he is the holder of a large number of shares, by allowing a certain number of his shares to be used for the purpose of raising a loan. Or, again, persons who are allottees of the company of shares already issued may find it to their interest to assist the company if it is in necessity, by transferring their shares so as to enable the company to raise money upon them as security. Although they have executed a transfer it does not follow that the transferee under such circumstances as these would be asked to execute it. They might execute transfers and hand them to the company, and the company might issue certificates to the transferees for this purpose as collateral security; and it is quite conceivable that those who allowed such use to be made of their shares might even desire that their names should not appear in the transaction. I put those instances, but other instances might be put.

It is said the appellant did not think of all this. I daresay he did not think of it—he did not think anything about it; it was enough for him to be told they were fully paid up, and he believed it. I only put these cases for the purpose of shewing that it is not correct to say that, knowing the facts as he did, that these shares had come from the company, he must, if he had thought of it, have known that they were not fully paid up. He might have thought about it, and if he had the knowledge which seems to me to be somewhat unreasonably attributed to him, he might very well have come to the conclusion that there was nothing inconsistent with those shares being fully paid up in the fact that he got the shares from the company, and was at the request of the company, if he got paid part of the mortgage money, to retransfer a proportionate part of them to the company.

That appears to me to be the answer to a good deal of the reasoning that is found in the judgments in the Court below. One of the learned Lords Justices came to the conclusion that he did in point of fact think that these were shares issued by the company; that he did in point of fact think that nothing had been paid upon them; but at the same time he thought,

erroneously in point of law, that although nothing had been paid upon them they might be treated as fully paid up. I do not see anything to justify those conclusions in point of fact. What the appellant in effect says is quite satisfactory to my mind: that he did not think about it at all; he was told these shares were fully paid up; he believed it, and that was enough for him; he did not care to inquire or to think; on that belief he acted; that belief was a false belief; that false belief was induced by the company. If so, you have every element necessary to make an estoppel and justify the appellant in this appeal.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Mr. Bloomenthal accepted the position of registered proprietor of these shares upon the faith of the statement of the company under its common seal that on each the full amount had been paid. The whole of the evidence on the subject has been read to your Lordships, and it has been commented upon very ably by the learned counsel for the respondent; but there is nothing in the evidence, or in the circumstances of the case, to lead me to suppose that Mr. Bloomenthal did not honestly believe and rely upon that statement. If he had thought the matter out, as it is said he ought to have done, and if he had been qualified to think the matter out to the very end, I do not see that it would have struck him necessarily and as a matter of course that there was something wrong in the transaction. It is quite conceivable that persons who were fully paid shareholders or entitled to fully paid shares, being interested in preserving the undertaking, might have placed their shares at the disposal of the company to enable it to meet its immediate necessities without taking an active or prominent part themselves in raising the money required for the purpose.

I agree in thinking that the appeal ought to be allowed.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, the reasons upon which this judgment is to be reversed have been so fully stated by your

H. L. (E.) 1897 BLOOMENTHAL v. FORD.

Lordships that it is sufficient for me to say that I concur in them, and that in my opinion the appeal should be allowed.

Order appealed from and Order of High Court thereby affirmed reversed with costs here and below : Cause remitted to the High Court.

Lords' Journals, February 23, 1897.

Solicitors for appellant : *Romer & Haslam.*
Solicitors for respondent : *Gush, Phillips, Walters & Williams.*

[HOUSE OF LORDS.]

H. L. (E.) 1897 *March* 16.

HENRY HOLLIER HOOD BARRS . . APPELLANT;

AND

CROSSMAN & PRICHARD . . . . . RESPONDENTS.

Practice—Costs—Solicitor—Reversal of Judgment—Repayment of Costs.

A solicitor who has demanded and received payment of costs payable to his client under an order of Court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him where there has been no misconduct and no undertaking to repay.

The decision of the Court of Appeal, [1896] 1 Q. B. 610, affirmed.

JUDGMENT for debt and costs having been obtained against the defendant, Mrs. Heriot, in the action *Loftus* v. *Heriot*, orders were made at chambers by Lawrance and Day JJ. with regard to execution upon the defendant's separate property. Upon appeal by the defendant these orders were discharged and the appeal allowed with costs by the Court of Appeal. (1) The present appellant (who had been substituted for the original plaintiff) applied in vain to the Court of Appeal for a stay of execution, pending an appeal to this House. The defendant's costs were taxed at 66*l.* 4*s.* 2*d.* and were paid by the appellant to the respondents, they demanding payment and refusing to give him an undertaking to repay the amount if the appeal

(1) [1895] 2 Q. B. 212.

should be successful. In this House the decision of the Court of Appeal was reversed; the orders of Lawrance and Day JJ. were restored; and it was ordered that Mrs. Heriot (the then respondent) should pay the appellant the costs incurred by him in the Court of Appeal and the costs of the appeal to this House, and should repay him all such costs as he had already paid to her; and that the cause should be remitted to the Queen's Bench Division to do therein as should be just and consistent with the judgment of this House. (1)

The appellant then moved the Court of Appeal to order the present respondents to repay the 66*l.* 4*s.* 2*d.* This motion was refused on April 20, 1896. (2) The Court having expressed doubts as to their jurisdiction, the appellant made the judgment of this House an order of the High Court and took out a summons at chambers that the respondents as solicitors and officers of the Court might be ordered to repay the amount. Pollock B. made no order and his decision was affirmed by the Court of Appeal on July 18. The present appeal was brought from these two orders of the Court of Appeal dated April 20 and July 18, 1896, respectively.

It appeared that the respondents, who were the London agents of Mrs. Heriot's country solicitor, had given credit for the 66*l.* 4*s.* 2*d.* in their account with him, the balance being in the respondents' favour; and that the country solicitor had given Mrs. Heriot credit for the 66*l.* 4*s.* 2*d.* in his account with her, the balance being in his favour.

Appellant in person. Solicitors are officers of the High Court, and the Court has jurisdiction over its own officers to order them to repay money in their hands to the person rightfully entitled to it. If this money had been actually paid over by the solicitors to their client the case would be different, but here it is still in the solicitors' hands and it was received with the knowledge that an appeal was pending which was successful. It is a common case for a Court to refuse a stay of execution on condition that the solicitor undertakes to repay the costs if the judgment is reversed. This is a strong argument

(1) [1896] A. C. 174. (2) [1896] 1 Q. B. 610.

H. L. (E.) 1897 HOOD BARRS v. CROSSMAN & PRICHARD.

to shew that there is the jurisdiction to order repayment of the costs by the solicitor; and it was so considered in *Fitzmaurice* v. *Jordan* (1), where the solicitor was ordered to repay the costs in default of the party paying them. It is true that in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (2) an adverse opinion was expressed by Cotton L.J., but it was only a dictum, the solicitors not being present, and cannot avail against the high authority of the Irish decision. An order upon the party to pay costs affects the agent and the money in his hands. It cannot be right that a principal should obtain an advantage by appointing an agent to receive the taxed costs, so as to deprive a successful appellant of his right to repayment.

Jelf Q.C. and *S. Macaskie* for the respondents were not heard.

LORD HERSCHELL (after stating the facts). My Lords, I am of opinion that the appeal must be dismissed. No precedent has been cited in which the Courts in England have ever made such an order as the appellant contends for. In the case of the *Lydney and Wigpool Iron Ore Co.* v. *Bird* (2) an application was made for an order that the solicitors should repay the money, the judgment having been reversed. The solicitors were not before the Court: the client only was represented; but the Court consulted the registrars as to the practice, and they stated that there was no precedent for such an order as that the solicitor should repay the costs. Cotton L.J., after saying it was impossible to make an order upon the solicitors if they were not before the Court, added: "But I do not encourage any application against the solicitors to make them repay the costs, for I think such an application would fail. The order does not direct the money to be paid to the solicitors in their own right, but only on behalf of James Bird, just as if he had given them a power of attorney and the money had been paid out to them as his attorneys." Lindley L.J. expressed no opinion upon the question as to whether an order could be made against the solicitors, if they were before the Court.

(1) (1892) 32 L. R. Ir. 112. (2) (1886) 33 Ch. D. 85, 96.

Lopes L.J. said: "I agree in thinking that the money was ordered to be paid to the solicitors on behalf of James Bird, and James Bird is therefore alone liable to repay it."

So the matter stands as regards this country, and it is to be observed that nothing is more common than for the Court, when refusing to stay execution and allowing costs to be received, to require the solicitor who is to receive them to give a personal undertaking to repay them if the Court of Appeal should reverse the order for their payment.

My Lords, the fact that such undertakings are constantly required and constantly given is, to my mind, almost conclusive against the notion that the Court has power when no such undertaking has been required and given to order the solicitor to repay the costs. If the Court has such inherent power without any undertaking, it is nonsensical and ridiculous in the Court to require an undertaking to be given. It is requiring the solicitor to undertake to do that which it is said can well be enforced without any undertaking on his part.

It is true that in the case of *Fitzmaurice* v. *Jordan* (1), where there had been a difference of opinion in the Court of Queen's Bench and notice of appeal had been given to the solicitors, the Court of Appeal made an order, when the appeal had taken place and the judgment had been reversed, that the solicitors should repay the money. With all respect, I cannot see my way to accept that decision if it is to be held to cover, as it apparently would cover, such a case as the present. Fitz-Gibbon L.J., who delivered the judgment said: "I think there is a precise analogy in the ordinary case where the Court orders costs to be paid to a solicitor pending an appeal, but requires his personal undertaking that he will be answerable for the amount. . . . It seems to me to be equally reasonable that the same risk should be taken where the solicitor levies the money after notice of appeal." My Lords, that might or might not be a sound law to enact and to make general; but I am unable to come to the conclusion that there is any such rule of law as that a solicitor is personally liable to repay the costs.

I desire only to add this. In the present case Mr. Hood

(1) 32 L. R. Ir. 112.

H. L. (E.) 1897

HOOD BARRS v. CROSSMAN & PRICHARD.

Lord Herschell.

Barrs applied to the Court of Appeal for a stay of execution pending the appeal to this House, but he did not apply to the Court, if they were not prepared to stay execution, that they should require an undertaking from the solicitors to repay the costs. I cannot myself doubt that if that application had been made it would have been granted. I say I cannot doubt it, because it appears to me so very clear that it ought to have been granted, if the application had been made, in a case of this description, where the whole controversy arose by reason of the difficulty of obtaining from a married woman payment of an undoubted debt, she interposing these difficulties and sheltering herself by reason of the circumstance that she was a married woman. Where the party to a litigation is a married woman who is setting up these obstacles, it seems to me that is pre-eminently a case in which, if the costs are to be paid, a personal undertaking should be required from the solicitor. However, no such application was made in the present case; if it had been, very likely this litigation would never have arisen. It is impossible to hold otherwise than that the decision of the Court below was correct, and that this appeal must be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and, agreeing in every word that has fallen from my noble and learned friend, I do not think it necessary to add anything.

LORDS MORRIS and SHAND concurred.

Orders appealed from affirmed and appeal dismissed with costs.

Lords' Journals, March 16, 1897.

Solicitors for appellant: *Hood Barrs & Co.*
Solicitors for respondents: *Crossman & Prichard.*

[HOUSE OF LORDS.]

HENRY HOLLIER HOOD BARRS . . . APPELLANT; AND SMARAGDA HERIOT . . . . . RESPONDENT.

H. L. (E.) 1897 March 16.

Married Woman—Separate Estate—Restraint on Anticipation—Appeal by Married Woman Defendant—Costs—"Proceeding Instituted"—Married Women's Property Act 1893 c. 63 *s.* 2.

An appeal by a woman from a judgment in an action in which she is defendant is not a "proceeding instituted" within the meaning of the Married Women's Property Act 1893 c. 63 s. 2, and an order cannot be made under that section for the payment of the costs of the opposite party out of her separate property which is subject to a restraint upon anticipation. The section applies only to an action or other litigation initiated by a woman.

Hood Barrs v. *Cathcart*, [1894] 3 Ch. 376, approved.

THE proceedings in the action of *Loftus* v. *Heriot* having been related in the report of the appeal immediately preceding this, it is enough to state that after the appellant had obtained the judgment of this House ordering Mrs. Heriot to pay the appellant the costs incurred by him in her appeal to the Court of Appeal, he moved the Court of Appeal for an order that those costs should be payable out of Mrs. Heriot's separate property, notwithstanding any restraint upon anticipation, pursuant to the Married Women's Property Act 1893 s. 2. The motion was dismissed on April 20, 1896, the Court of Appeal being of opinion that they had no jurisdiction, but that if they had the case was governed by *Hood Barrs* v. *Cathcart*. (1) The appellant then made a similar application by summons before Pollock B. which was refused, and that decision was affirmed by the Court of Appeal. The present appeal was brought from these two orders of the Court of Appeal.

Married Women's Property Act 1893 c. 63 s. 2: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by

(1) [1894] 3 Ch. 376.

H. L. (E.) 1897 HOOD BARRS v. HERIOT.

judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Appellant in person. The question is whether the decision in *Hood Barrs* v. *Cathcart* (1) is right. If this were the case merely of a defendant taking out a summons and getting an order for particulars of claim, or some such ordinary step in defence, it would not be a "proceeding instituted" within the meaning of the Act. But an appeal from a judgment is not a mere step in the action; it is a new departure, a separate proceeding. To come within the Act there need not be an action to give the Court jurisdiction; there are many "proceedings" besides actions; e.g. originating summonses and the like. The statute says "instituted" not "commenced." An appeal is instituted, not as a defence to an action, but as a fresh proceeding. The Act contains very wholesome legislation with the object of preventing married women defeating their creditors, and a narrow, technical, view ought not to be taken. The Court of Appeal was the Court before which the "proceeding was pending" within the meaning of the Act; if not, the High Court was.

The respondent did not appear.

LORD HERSCHELL (after stating the facts and reading s. 2 of the Act). My Lords, in the present case the action was not brought by the married woman but against her. It is said that although the action was not brought by her, yet the appeal in the action was a "proceeding instituted" by her within the meaning of the section. I should myself perhaps feel no indisposition so to construe the section if it were possible, because there seems nothing unreasonable in the view that, if an appeal is brought by a married woman which never ought to have been brought, and therefore costs are occasioned, the Court should have jurisdiction to deal with the matter. The section, of course, does not compel them to exercise that jurisdiction in any par-

(1) [1894] 3 Ch. 376.

ticular way; the matter is left entirely to their own judgment. But however reasonable one might think such legislation would be, I do not think it is possible so to construe the section which your Lordships are now considering. If we were to hold that an appeal presented by a married woman is a "proceeding instituted" by her, then I do not think it would be possible to avoid holding that any proceeding taken by a married woman in the course of an action against her would be a proceeding within the meaning of the section. The Court, in each of those steps she might take in an action brought against her, would have jurisdiction to enter upon this inquiry and to deal separately and independently with the costs of each of those "proceedings" under the section. I do not think that was ever intended, nor do I think that the words which the Legislature has employed are apt to give the Court any such jurisdiction. The words "in any action or proceeding instituted," refer I think to an action or some other litigation initiated by the married woman. Unless the proceeding is one which initiates litigation, it seems to me that it is not a proceeding within the true intent and meaning of the clause upon which reliance is placed. Of course, if that construction be the correct one—and it is the construction adopted by the Court of Appeal in *Hood Barrs* v. *Cathcart* (1)—it follows that the appellant's appeal must fail. In my opinion that construction is a sound one, and it is the only one which it is possible to put upon the section, even though one might not have been unwilling, if it were possible, to embrace other cases within the clause.

For these reasons I move your Lordships that this appeal be dismissed.

LORDS MACNAGHTEN, MORRIS and SHAND concurred.

Orders appealed from affirmed and appeal dismissed.

Lords' Journals, March 16, 1897.

Solicitors for appellant: *Hood Barrs & Co.*

(1) [1894] 3 Ch. 376.

[HOUSE OF LORDS.]

H. L. (E.) 1897 March 19.

JOHN KENNEDY . . . . . APPELLANT;

AND

MARY ANNETTE DE TRAFFORD, HENRY STOURTON (SINCE DECEASED) AND JOSEPH BOTTOMLEY DODSON } RESPONDENTS.

Mortgage—Power of Sale—Sale to one of several Mortgagors—Tenants in Common—Purchase by One Co-Tenant—Mortgagee, Duties of.

The only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in his mortgage is that he should act in good faith. In determining whether the mortgagee's conduct in that respect comes up to the required standard regard must be had to the circumstances of the particular case.

Mortgagees under a mortgage by two tenants in common, one of whom became bankrupt, sold by private contract to the other for a sum equal to the exact amount due in respect of the mortgage for principal, interest and costs, the bulk of the purchase-money being left on the security of the property:—

Held, under the circumstances that the transaction was a proper exercise of the power of sale, and that the sale was valid for all purposes, giving rise to no claim on the part of the bankrupt's estate either against the mortgagees or against the purchaser.

There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

The decision of the Court of Appeal, [1896] 1 Ch. 762, affirmed.

IN 1877, Carswell and the respondent Dodson, tenants in common in fee of freehold property in Manchester, mortgaged it to Sir H. de Trafford for 60,000*l.*, with a proviso for redemption and re-conveyance to the mortgagors as tenants in common, and the usual power of sale after six months' notice.

In 1886 Carswell was adjudicated bankrupt, and the appellant was subsequently appointed his trustee. Sir H. de Trafford having died his executors (now represented by the respondent De Trafford) in 1886 gave notice to pay off the mortgage. In 1887 the mortgagees were threatening foreclosure. The appellant having declined to redeem, the mortgagees in July 1888 gave to him and to Dodson notice of their intention to

sell (if they could obtain principal, interest and costs) in the terms set out in Lord Herschell's judgment. Having advertised for tenders the mortgagees in 1889 sold under their power of sale to Dodson for the amount due for principal, interest and costs, 54,000*l.* being left on mortgage and the rest paid off. Before the sale the appellant was informed of all the particulars, except the name of the purchaser. In 1891 he discovered that the purchaser was Dodson, and in 1895 he brought this action in the County Palatine of Lancaster against the respondents, claiming (inter alia) to set aside the sale as invalid; redemption and a sale; alternatively, damages against the mortgagees for negligence in the exercise of the power of sale.

The Vice-Chancellor being of opinion upon the evidence that Dodson stood in a fiduciary relation towards the appellant, made an order declaring (inter alia) that the sale was not a due exercise of the power of sale and ought to be set aside; and that Dodson was not entitled to retain for his sole benefit the entirety of the property or of the equity of redemption, but that the appellant was entitled to an undivided moiety thereof, subject to the amount owing under or by virtue of the sale; and he ordered accordingly. The Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.) reversed this decision and dismissed the action with costs. (1)

On the argument of the present appeal by the plaintiff the main contention on his behalf was that Dodson had collected the rents and managed the property as agent for the appellant and also for the mortgagees, but as will be seen their Lordships thought that there was no evidence whatever of this.

March. 18, 19. *Farwell Q.C.* and *A. C. Maberly* for the appellant. The evidence shews that the respondent Dodson received the rents and managed the property as agent at first for his co-owner and the appellant in succession, and latterly for the mortgagees. Thus he stood in a fiduciary relation to those persons who were his principals, and he could not buy the property. Having once acquired knowledge in that fiduciary relation he could not use it for his own advantage after the

(1) [1896] 1 Ch. 762.

H. L. (E.) 1897 KENNEDY v. DE TRAFFORD.

agency ceased. These propositions are too well established to be now disputed: *Ex parte Lacey* (1); *Eyre* v. *M'Donnell* (2); *Orme* v. *Wright* (3); *Carter* v. *Palmer* (4); *Martinson* v. *Clowes*. (5) If the sale cannot now be set aside the appellant is entitled to share the benefit of Dodson's purchase.

Independently of agency a tenant in common stands in a fiduciary relation to his co-tenant. One of several tenants in common who distrains is bailiff for the others: *Leigh* v. *Shepherd* (6); 2 Co. Litt. 166a. In cases of limited ownership there is a duty to act for the benefit of the whole interests. One of two tenants in common cannot "without the consent of the other buy in an outstanding title and appropriate the whole subject to himself"; such a purchase will enure to their common benefit: per Chancellor Kent in *Van Horne* v. *Fonda*. (7) There is no decision to that effect in the English Courts with regard to tenants in common, but the doctrine has been applied in England to the case of the renewal of a lease by one of several persons jointly interested in a lease: *Palmer* v. *Young* (8); *Hamilton* v. *Denny* (9); and see notes to *Keech* v. *Sandford* (Rumford Market case). (10) If a mortgagee renews a lease, the renewal will be for the mortgagor's benefit: *Rushworth's Case*. (11)

The sale was at an undervalue. The mortgagees did not take all reasonable pains to secure a purchaser at the best price as they were bound to do: *Farrar* v. *Farrars, Limited*. (12) The transaction was really not a sale but a redemption, being for the exact amount due for principal, interest and costs, and was in pursuance of a scheme by Dodson to get a redemption for his sole benefit, which should have been for the benefit of both co-owners.

Warmington Q.C. and *T. Clarkson* for the respondent De Trafford, and *Astbury Q.C.* and *G. Dodson* for the respondent Dodson, were not heard.

(1) (1802) 6 Ves. 625.
(2) (1864) 15 Ir. Ch. Rep. 534.
(3) (1839) 3 Jur. 19, 972.
(4) (1841) 8 Cl. & F. 657, 705.
(5) (1882) 21 Ch. D. 857.
(6) (1821) 2 B. & B. 465.
(7) (1821) 5 Johns. Ch. (N.Y.) 388, 406.
(8) (1684) 1 Vern. 276.
(9) (1809) 1 Ball & B. 199.
(10) (1726) 1 W. & T. 6th ed. pp. 53, 58.
(11) (1676) Freem. Ch. 12.
(12) (1888) 40 Ch. D. 395.

LORD HERSCHELL. My Lords, I confess I think this as hopeless an appeal as has ever been presented to your Lordships.

The action is brought against the mortgagees of some property in Manchester to set aside a sale made by them under the power of sale contained in their mortgage deed. The property mortgaged was held by two persons, the defendant Dodson and a Mr. Carswell, as tenants in common. They were co-owners, each possessing an undivided moiety. The mortgage was for a sum of 60,000*l.* to Sir Humphrey de Trafford, who is represented, he being dead, by the respondent De Trafford. It appears that the mortgagees became uneasy about their security, it matters not why, and gave notice calling in the money and pressing for payment. Payment was not made. Various proposals from time to time were made, none of which came to any effect. At the time to which I am referring Carswell had transferred his interest by a voluntary settlement to Brown, and he afterwards became bankrupt, and on the occasion of his bankruptcy Dr. Kennedy, the appellant, was appointed trustee.

The rents no doubt were collected from time to time by Dodson, one of the defendants in this action, and one of the co-owners. I will come in a moment to the circumstances under which they were collected, but I will deal first with the questions raised with regard to the circumstances of the sale. Having, as I have said, called in their money, and payment not having been made, as they desired to reduce the mortgage debt, the mortgagees, then represented by their solicitor Mr. Taylor, stated that they must be paid the rents of the property as received instead of their being held by the co-owners for their own benefit subject to the payment of the interest. Accordingly, from a date in the year 1887, the rents were paid over from time to time by Mr. Dodson, who received them, to the mortgagees. But they were not satisfied to let that state of things continue indefinitely; they kept pressing for payment and insisting upon payment. Ultimately they gave notice that they would take proceedings to foreclose. It was suggested that there should be a conveyance of the equity of redemption

H. L. (E.) 1897 KENNEDY v. DE TRAFFORD. Lord Herschell.

to save the trouble of foreclosing. Then they gave to Dr. Kennedy, the trustee in the bankruptcy who represented one moiety, this notice: "Our clients' instructions are to realize this security if they can obtain principal, interest and costs. Is Mr. Carswell's trustee" (that is Kennedy) "prepared to pay them off? If not we shall forthwith endeavour to effect a sale by private treaty. We are writing a similar letter to Mr. Dodson." There was a similar letter written to Mr. Dodson.

Now, the mortgagees having given that distinct notice that unless the parties came forward and paid off the mortgage they were prepared to sell at a price which would realize principal, interest and costs, it seems that at a somewhat later period Mr. Dodson entered into negotiations to become himself the purchaser of the property, and ultimately an arrangement was come to in December, 1888, according to which the mortgagees were willing to sell to Dodson for the amount of principal, interest and costs, and they were willing to leave 54,000*l.* of the money on mortgage after the sale was completed. Mr. Dodson wished for some delay in order to be able to be in a position to carry out that arrangement, and it was agreed that the matter should be completed in the following April. In the month of February, 1889, a communication was made to Dr. Kennedy, or to his solicitors (it matters not which), that the mortgagees were negotiating a sale on the basis of payment of an amount equal to principal, interest and costs; so that that was known to Dr. Kennedy in February, 1889. In May the transaction was completed by a conveyance. In the autumn of 1891 Dr. Kennedy took his first step in the way of making inquiries as to what the mortgagees had done, with a view to this action, which was afterwards brought.

My Lords, the appellant seeks to set aside the mortgage, on the ground that the mortgagees have been guilty of a breach of duty in relation to this sale. First of all it is said that they have sold at an undervalue, and that that sale at an undervalue has arisen from their not discharging the duties incumbent upon them as mortgagees. Now, it is not disputed that they sold in good faith. They did not intend to do anything

else but properly exercise the power of sale vested in them under their mortgage. But it is alleged that they did not put up the premises for sale by auction, that they only inserted two advertisements inviting a sale by tender, and that they ultimately sold for the amount of principal, interest and costs to Mr. Dodson.

My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley L.J., in the Court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

My Lords, it is not necessary in this case to give an exhaustive definition of the duties of a mortgagee to a mortgagor, because it appears to me that, if you were to accept the definition of them for which the appellant contends, namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, still in this case he did take reasonable precautions. Of course, all the circumstances of the case must be looked at. To sell in the manner in which the sale here took place might, let us assume for the moment, be under some circumstances improper. What we have to deal with are the existing circumstances. Now here there are the two co-owners, who are not acting in all respects harmoniously together. The mortgagee communicates what he is about to do to each of these co-owners. He tells each of them that he is preparing to sell, and that he is

H. L. (E.) 1897 KENNEDY v. DE TRAFFORD. Lord Herschell.

willing to take principal, interest and costs. To that he has received from the present appellant no remonstrance, no answer. Why is he to suppose for a moment that he would receive no answer or remonstrance if Dr. Kennedy thought that selling on such terms would be an improper sale as being at an undervalue, because it must be certain that more than that sum could easily be obtained? It is obvious that where such a communication is made, and no answer is received and no objection put forward, the mortgagee may very reasonably suppose that no objection can be taken, and that nobody considers that he will be selling at an undervalue if he sells for principal, interest and costs. My Lords, having regard to the notice given under those circumstances to Dr. Kennedy, and to the fact that he had heard in February, 1889, that the property was being sold for principal, interest and costs, and then took no objection to it, it seems to me preposterous for him to come forward at this time of day and allege that he has a right on that ground to insist that the sale is invalid on the ground that the mortgagee did not take proper precautions in making the sale.

But then it is said that the sale was made to a person who was incapable of buying, because he was in a fiduciary relation, and that that fiduciary relation was known to the mortgagees who sold. My Lords, I do not think it is established here that there was a fiduciary relation between the defendant Dodson and Kennedy. What are the facts? The mortgagors are co-owners, and no doubt one co-owner, Mr. Dodson, had been left by Carswell, in the first instance, I dare say, to collect the rents. Afterwards an arrangement was come to between him and Mr. Brown, who then represented Carswell's interest, that Dodson should collect the rents and pay the money into a bank, and that each of them should draw on that account for the expenses and for the division of the money which thus belonged to them. But, my Lords, it is a fallacy altogether to say that Dodson only got his right to collect the rents by virtue of that arrangement. Dodson was an owner of this property—the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner—and Dodson in collecting those rents and profits collected them in the right

which he possessed as a co-owner of the property. He did not need agency or the appointment of agent to justify him in collecting those rents. If nothing had ever passed between the two co-owners which constituted an authority from the one to act for the other, his right to collect those rents would not have been one jot or one tittle less than it was. No doubt an arrangement was come to that these rents when collected were to be paid into a bank upon which both the co-owners were to draw, but that was an arrangement that might have been put an end to at any time. It was merely an arrangement which was come to by voluntary agreement between the two co-owners. Each co-owner would have an obligation to account to the other in respect of any rents he collected or moneys he received under it.

So much, my Lords, for the relation between Dodson and Brown prior to the bankruptcy, or prior to the date of the setting aside of the voluntary agreement; but after that date Dr. Kennedy became a co-owner, and there was no arrangement between Dr. Kennedy and Mr. Dodson at all. What happened was this—that the mortgagees had said to Dodson, "Now you must pay over the rents to us in reduction of our mortgage debt and payment of interest. You must no longer keep them or pay them to your co-owner." They were in a position to insist upon that. Accordingly, they insisting upon that, Dodson did deal in that way with the rents which he collected. That was the state of things during the time that Kennedy was the co-owner. Dodson not only never received any authority from Kennedy to collect these rents, but he never did collect them for Kennedy otherwise than as paying them over to the mortgagees to whom he was bound to pay them over. At all events, it is enough to say that there is not a shadow of ground for suggesting that during that time he was the agent of Kennedy.

But then, my Lords, it is said that during that period he was the agent of the mortgagees because, they having insisted that he was to collect these rents and pay them over to them, he became their agent in that respect. My Lords, it seems to me to be clear that he was not their agent to collect these rents.

H. L. (E.) 1897 KENNEDY v. DE TRAFFORD. Lord Herschell.

He collected these rents in his own right—the right he had as owner. He was collecting his own rents. No doubt they had insisted that those rents should be paid to them; but how the fact that the mortgagees had said, "When you have got your rents, pay them to us," made Dodson their agent to collect them, I am at a loss to see. Therefore, my Lords, I take it to be abundantly clear that he was not the agent of the mortgagees in collecting the rents any more than he was the agent of Dr. Kennedy or than he had been the agent of Brown.

But then it is said, If you look at the evidence of Dodson you will find that he said he was an agent. My Lords, I confess I do not think it is of any importance to look at any particular words of that sort used in evidence, especially when the words originated with the counsel and did not originate with the witness. No word is more commonly and constantly abused than the word "agent." A person may be spoken of as an "agent," and no doubt in the popular sense of the word may properly be said to be an "agent," although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading. Therefore whatever expressions Dodson may have used calling himself an agent, and however true or applicable they may have been in a popular sense, in point of law and in their legal sense they are meaningless. Dodson was not the agent of Kennedy, and he was not the agent of the mortgagees. If that be so, there is an end of the fiduciary relationship which is supposed to prevent his being a purchaser.

My Lords, it is said in the present case, and I think that is the only other point that is urged, that it was concealed by the vendors, the mortgagees, from Kennedy that Dodson was the person who was purchasing, although they informed Kennedy that the purchase was being made and they informed him of the terms on which it was being made. It seems to me to be utterly unimportant. If there was no fiduciary relation there was no obligation to reveal the name; there was no right in the other party to know it; there was no duty upon them to communicate it.

Therefore, my Lords, it seems to me that all the grounds

upon which the right to set aside this sale has been rested utterly and entirely fail.

Another point has been raised—whether it arises upon the pleadings or not seems very doubtful—namely, that whether the sale is to be set aside or not Kennedy is entitled to claim as against Dodson, that under the circumstances under which Dodson bought he should be declared trustee of the one moiety for Kennedy. My Lords, that depends in the first place upon the question of the fiduciary relationship between them arising out of what has been said to be the management of the property and the collection of the rents. I have already, I think, sufficiently dealt with that part of the case. It is quite clear that in all the transactions for some time prior to this sale Dodson was not in any sort of way acting for his co-owner; the two were acting each for himself. The communications from the mortgagees were made to both of them, and so far from Dodson acting as Dr. Kennedy's agent, there was a certain amount of hostility between them; at any rate, there was a want of harmonious action.

But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such a relationship between them that the one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one half of that purchase should be his. My Lords, no authority has been cited in support of such a proposition. Cases have been referred to, of a very different description, where the owner of an estate under a settlement, a tenant for life for example, has been held incapable of obtaining an enlargement of that estate for himself alone. It has been said that whatever benefit he gets must enure to the benefit of all taking under the settlement. That is a totally different case from this case.

The only authority, if it can be so called, which has been cited is the case before Chancellor Kent; but he commences his observations by saying that he is not going to lay down a general rule which would be applicable to such a case as this. He deals with the particular case, the circumstances of which were peculiar and of immense complication, and he certainly

H. L. (E.) 1897 KENNEDY v. DE TRAFFORD. Lord Herschell.

does not lay down any rule or doctrine of law which supports the argument which has been addressed to your Lordships. It is not necessary to enter into the details of that case. It is enough to say that even if it is to be taken as enunciating a rule of law which would be as applicable in this country as in America, it does not enunciate any rule of law which would be sufficient for the appellant in the present case.

My Lords, I think I have now covered the whole of the ground, and it only remains for me to move your Lordships that this judgment be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Mr. Farwell has argued this case with his usual ability and his usual fairness, but I must say that in the whole course of my experience I have not met with a bolder or more hopeless appeal. Certainly I never expected to find a proposition which was once thought by a great judge to be so absurd as to suggest a complete answer to a case that had in it some show and appearance of justice, put forward in these latter days as the foundation and starting-point of a serious argument in this House.

In the case of *M'Mahon* v. *Burchell* (1), before Lord Cottenham, one tenant in common claimed rent from his co-tenant who had been in occupation of the property. The Lord Chancellor says: "I must therefore take it that the defendant means to raise this proposition—that the fact of the plaintiff having occupied the house not in entirety but as a tenant in common, makes him liable to his co-tenant. A case has been referred to in which the Vice-Chancellor of England is represented to have so decided; but I cannot think that the Vice-Chancellor can have laid down any such doctrine; for the effect would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff."

My Lords, that which seemed to Lord Cottenham a reductio ad absurdum was the very ground on which this case was

(1) (1846) 2 Ph. 127, 134.

opened before your Lordships. It was said that Dr. Kennedy took no part in the management of the property, that he kept aloof and left everything to Dodson, and therefore Dodson was his bailiff. That was the exact position which Mr. Farwell in the opening of his case assigned to Dodson. My Lords, there is no foundation for such a proposition in any of the books or in any of the authorities that have been cited.

Nor is there anything in the other ground on which it was attempted to rest the case, the doctrine of principal and agent. In the whole of this bulky volume I cannot find a scrap of evidence to shew that Dodson ever accepted the position of agent in regard to Dr. Kennedy as his principal.

On both these grounds it appears to me that the case entirely fails.

But I must say I rather think Dr. Kennedy did himself injustice in saying that he left everything to Dodson. He put his moiety up to auction. He employed his solicitors to dispose of it, and I find a bill of costs which shews that they exerted themselves thoroughly for several months, making inquiries here, and making inquiries there, and doing everything that could be expected from persons in their position. Their bill begins in May 1888, and goes down to August. They get all the documents, they write to all sorts of people, they receive several answers, and they charge for several attendances; they communicate with parties requiring particulars of the property, and so on. The bill goes down to August 3, and then, on August 10, there comes this letter from Taylor & Co. to these gentlemen saying, "As we have had no communication from you in this matter since your client's moiety was put up to auction we presume he has abandoned the idea of purchasing, and we shall now deal with the property as we think best in the interests of our clients without any further notice to your client." That letter was not answered. It appears to me that as they received no answer to that letter the mortgagees were justified in supposing that Dr. Kennedy had abandoned the property for good and all; and thereupon they sold it, as I think they were entitled to do, to Dodson. I think they did everything that could reasonably be expected of them; but I agree with

H. L. (E.) 1897

KENNEDY v. DE TRAFFORD.

Lord Macnaghten.

what has fallen from my noble and learned Friend on the Woolsack: if a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached.

My Lords, I agree that this appeal must be dismissed with costs.

LORD MORRIS. My Lords, I concur. There is nothing that I can add with advantage.

LORD SHAND. My Lords, this case has formed the subject of very full opinions in the Court of Appeal. After what your Lordships have said I have nothing to add, except that I entirely concur in what was said by the learned judges in the Court below, and what has fallen from your Lordships.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, March 19, 1897.

Solicitors for appellants: *Chester, Mayhew, Broome & Griffiths, for Crofton, Craven & Worthington, Manchester.*

Solicitor for respondent De Trafford: *L. W. Byrne, for Taylor, Kirkman & Colley, Manchester.*

Solicitors for respondent Dodson: *Pritchard, Englefield & Co., for Boote & Edgar, Manchester.*

[PRIVY COUNCIL.]

EDISON GENERAL ELECTRIC COMPANY . . . . . } PLAINTIFFS;

AND

WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, THE BANK OF BRITISH COLUMBIA AND OTHERS } DEFENDANTS.

J. C.* 1896 July 23; Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Consolidated Statutes, c. 51, s. 1—Consent Judgment with intent to delay Creditors.

Under s. 1 of c. 51 of the Consolidated Statutes of British Columbia a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was *held* to be null and void against them. So long as the intent is proved, it is immaterial whether consent was given under pressure.

APPEAL from a decree of the Supreme Court (Jan. 30, 1896) affirming a decree of Crease J. (Feb. 11, 1895).

The appellants sued on behalf of themselves and all other creditors of the respondent tramway company to set aside a judgment against it obtained by the respondent bank as being null and void under s. 1, c. 51, of the Consolidated Statutes, and for a declaration that their own judgment against the tramway company was a first charge on its lands.

The material facts are stated in the judgment of their Lordships.

Both Courts dismissed the suit.

In appeal the Chief Justice held that the judgment sought to be set aside was given by the tramway company under pressure from the bank, and that there was no intention to defeat or delay creditors, or to give a preference to one creditor, within 13 Eliz. c. 5, or within s. 1, c. 51.

E. Blake, Q.C., and *J. D. Crawford*, for the appellant com-

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

J. C. 1896 EDISON GENERAL ELECTRIC COMPANY v. WESTMINSTER AND VANCOUVER TRAMWAY COMPANY.

pany, contended that the judgment in question was obtained by means of an agreement between the bank and the tramway company. The bank could not have obtained the judgment in priority to the appellant but for the assistance and co-operation of the tramway company. The intent and the result were to postpone the appellants' judgment. The bank knew of the insolvent circumstances of the company. Its judgment did not result from bonâ fide pressure, but from a collusive arrangement within the meaning of c. 51, s. 1. Reference was made to *Thurburn* v. *Steward* (1) as to the inferences which a judge is entitled to draw when dealing with evidence. And for cases upon analogous statutes see *Martin* v. *McAlpine* (2); *Meriden Silver Co.* v. *Lee* (3); *Ex parte Hall* (4); *Ex parte Hill* (5); *In re Bell, Ex parte Official Receiver* (6); *Fleming, Fraser & Co., Ex parte The Trustee* (7); *Gill* v. *Continental Gas Co.* (8)

Robinson, Q.C., and *Bray*, for the respondent bank, contended that on the evidence there was no collusion and no intent to defeat or delay creditors or to give the bank an undue preference. On the contrary, the evidence shewed that there was pressure by the bank on the tramway company, and that the judgment was bonâ fide consented to in consequence of such pressure. So far from intending to defeat creditors, the object was to protect the carrying through a process of reconstruction of the company, and so to put the company into the position to pay all creditors. There were concurrent findings of fact as to the absence of any intent which would bring the case within the statute. The Act was directed against fraudulent preferences, and in construing the word "collusion" this should be attended to. Reference was made to *Molson Bank* v. *Halter* (9); *Stephens* v. *McArthur* (10), citing Lord Cairns in *Butcher* v. *Stead.* (11)

Counsel for the appellants were not heard in reply.

(1) (1871) 7 Moore (N.S.) 333, 389.
(2) (1883) 8 Ont. A. R. 675.
(3) (1882) 2 Ont. R. 451.
(4) (1882) 19 Ch. D. 580.
(5) (1883) 23 Ch. D. 695.
(6) (1892) 10 Morrell, 15.
(7) (1888) 60 L. T. 154.
(8) (1872) L. R. 7 Ex. 332, 337.
(9) (1890) 18 S. C. R. 88.
(10) (1891) 19 S. C. R. 446.
(11) L. R. 7 H. L. 839.

1896. Nov. 21. The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this case was brought by the appellants in the Supreme Court of British Columbia against the respondents to have a judgment obtained by the Bank of British Columbia against the Westminster and Vancouver Tramway Company declared null and void, and the executions issued thereon and the certificates thereof, registered as a charge against the lands of the tramway company, set aside and cancelled.

It was dismissed with costs by the judge of the Supreme Court before whom it was heard, and on appeal by the plaintiffs to the full Court the appeal was dismissed with costs. At the hearing of that appeal and also of the present appeal the bank of British Columbia, alone appeared and defended the appeal.

The suit was founded upon s. 1 of c. 51 of the Consolidated Statutes of British Columbia, which is as follows :—

"In case any person being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors gives a confession of judgment, cognovit actionem or warrant of attorney to confess judgment, with intent in giving such confession, cognovit actionem or warrant of attorney to confess judgment, to defeat or delay his creditors wholly or in part, or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors or over any one or more of such creditors, every such confession, cognovit actionem or warrant of attorney to confess judgment shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution."

It was not disputed that the tramway company was insolvent on December 29, 1893, and that the appellants and the bank were its principal creditors. On that day the appellants obtained a judgment against the tramway company for $18,470.12 and costs. On January 13, 1894, a summons was taken out by the tramway company to set aside this judgment

J. C.
1896
EDISON GENERAL ELECTRIC COMPANY v. WESTMINSTER AND VANCOUVER TRAMWAY COMPANY.

with a stay of proceedings till January 24, 1894, the return day of the summons. On January 17, 1894, the bank issued a writ of summons against the tramway company for $261,217.67 and costs. On January 24 the tramway company entered an appearance, and before the hearing of the summons to set aside the appellants' judgment, on the application of the solicitors of the bank, with the written consent of the tramway company's solicitor, judgment was given by the judge sitting in chambers for the bank for $261,217.67 debt and costs. Afterwards, on the same day, the summons to set aside the appellants' judgment came on for hearing in court before the same judge, and on the 27th he gave judgment dismissing it with costs. On January 31 a writ of fieri facias on the appellants' judgment was issued to the sheriff and a return made of nulla bona.

The material facts with regard to the validity of the judgment for the bank are to be found in the evidence of the defendant Oppenheimer, the president of the tramway company, of Mr. William Murray, the manager of the bank, and Mr. E. A. Jenns, the solicitor for the tramway company. In his evidence Mr. Jenns said that he was solicitor for the tramway company from the middle of 1893 to the then present date; that he first heard of the judgment for the appellants having been signed on January 5, 1894; that about January 20 he had a conversation with Mr. Davis (the senior partner of the firm who were solicitors for the bank) and spoke to him about the company having decided to allow the bank to take judgment. Mr. Davis said he would prefer to wait and take judgment by default. Mr. Jenns thought he first heard on the 24th that the judgment was to be by consent, and even on the 24th he understood that the arrangement was that the bank was not to sign judgment in the event of "the Edison judgment" being set aside. It had been arranged by him with Mr. Davis, on the instructions he got from the company, that he was to consent to judgment; his instructions were to consent to judgment. As their Lordships are satisfied that there was pressure by the bank, it is not necessary to refer to his evidence on that matter, or to his evidence about the summons to set aside the appel-

lants' judgment. It was not proved that the bank or their solicitors in any way caused the summons to be issued. Mr. Murray, the manager of the bank at Vancouver, in his evidence said, that on hearing of the appellants' judgment he asked Mr. Davis's advice on the subject, and then sent for Mr. Oppenheimer, and told him that they would have to get in ahead of the Edison judgment—that they must have the first judgment. The arrangements were left with the solicitors. Mr. Oppenheimer said that, having received from Mr. Murray and Mr. Ward (the superintendent of the Vancouver branch of the bank) the intimation that the bank insisted upon having judgment prior to the Edison Company, he gave instructions to the solicitor to give the bank first judgment. He was cross-examined at some length as to the reasons for taking out the summons to set aside the judgment. It is not necessary, as before observed, to refer to this part of his evidence. Mr. Oppenheimer was also asked as to the reason for giving the bank the first judgment, and his evidence as to this may be summed up in one of his answers: he said that the controlling reason was to give the company time to make financial arrangements. It is apparent to their Lordships on the evidence that the bank did not intend immediately to enforce the judgment. The object both of the bank and the company was to protect the latter against the claim of the appellants, so that an attempt might be made to reconstruct the company and raise money to meet its liabilities. Mr. Ward in his evidence said that the object of the bank in trying to obtain priority for their judgment was that they should be able to protect the company, so as, if possible, to carry it on.

If the appellants' case had only been that there was a fraudulent preference of the bank, the pressure by the bank might have been an answer to it; but their Lordships do not see how pressure alone can be an answer to a case which alleges collusion. The statute is in the alternative. The confession of judgment may be given either voluntarily or by collusion with a creditor. In either case, if there is the intent to defeat or delay creditors or to give a preference over other creditors, the confession is made null and void against creditors. In

J. C. 1896 EDISON GENERAL ELECTRIC COMPANY v. WESTMINSTER AND VANCOUVER TRAMWAY COMPANY.

Gill v. *Continental Gas Co.* (1) Lord Bramwell said that the word "collusion" only signified agreement. In their Lordships' opinion "collusion" in this section means agreement or acting in concert. It is plain from the evidence that there was an agreement between the tramway company and the bank the effect of which was that the bank should have a judgment, and that their judgment should have priority to the appellants' judgment, the object being, as Mr. Ward said, that the bank should be in a position to protect the company, if possible, so as to carry it on. The case comes within the provision in the section. It has been argued for the respondents that the confession must be fraudulently given. The section does not use that word; but the giving a judgment by confession by a person in insolvent circumstances voluntarily or by collusion with a creditor with intent to defeat or delay his creditors, or to give a preference to one of them over the others, is treated by the statute as a fraudulent act. Their Lordships approve of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine*. (2)

Their Lordships are of opinion that the statute makes the bank's judgment null and void as against the creditors of the tramway company. They will, therefore, humbly advise Her Majesty to reverse the decree and order of the Supreme Court on the trial and on the appeal, and to declare the judgment of the bank against the tramway company to be null and void, and to order the executions issued thereon and the certificates thereof registered as a charge against the lands of the company to be set aside and cancelled, with costs of the suit, including costs of the appeal to the Supreme Court, but with liberty for the appellants to apply to the Supreme Court for any consequential relief for the purpose of enforcing their judgment. The respondents, the Bank of British Columbia, must pay the costs of this appeal.

Solicitor for appellants: *J. Cornelius Wheeler.*

Solicitors for respondent bank: *Freshfields & Williams.*

(1) L. R. 7 Ex. 337.

(2) 8 Ont. A. R. 675.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT; J. C.* 1896

AND

ATTORNEY-GENERAL FOR ONTARIO RESPONDENT. *Nov.* 11, 12; *Dec.* 9.

AND

ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Indian Reserves—Liability to pay Annuities in respect thereof —British North America Act, 1867, *ss.* 109, 111, 112.

By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—

Held that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under s. 109 in that province.

The perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111 and 112; in the same manner as the original annuities.

THESE two appeals were heard together from a judgment of the Supreme Court (Dec. 9, 1895), reversing an award made in an arbitration for settlement of all questions relating or incident to the accounts between the Dominion and the provinces of

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

J. C. 1896

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

Ontario and Quebec, and between the two provinces, pursuant to 54 & 55 Vict. c. 6 (Canada), 54 Vict. c. 2 (Ontario), and 54 Vict. c. 4 (Quebec).

The questions decided turn upon the construction of two Indian treaties in 1850, the effect of which is stated in the judgment of their Lordships, and of ss. 109, 111, and 112 of the British North America Act of 1867, which are as follows :—

"Sect. 109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

"111. Canada shall be liable for the debts and liabilities of each province existing at the Union."

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two millions five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

An award was made in 1870 under s. 142 of the Act the 13th section of which provided "that all the lands in either of the provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late Province of Canada, shall be the absolute property of the province in which the lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

Then came the arbitration under the three statutes of 1891 mentioned above, under which a claim was put forward by the Dominion Government on behalf of the Ojibeway Indians, based on the treaties: (*a*) against the Province of Canada for $325,440.00 arrears of augmented annuities from 1851 to 1867; (*b*) against the Province of Ontario for $95,200.00, being

unpaid arrears of augmented annuities from 1867 to 1873; (*c*) against the Province of Ontario for $389,106.80, being the amount of increased annuities actually paid by the Dominion Government to the Indians from 1874 to 1892.

No question arose in this appeal under (*a*), or in reference to the amounts of the annuities originally specified in the treaties. These latter were capitalised at the date of confederation and added to the debt of the old province which was assumed by the Dominion.

The claims (*b*) and (*c*) were based on this, that the Province of Ontario, having succeeded to the lands surrendered, was liable for such increased annuities and payments under the treaties and s. 109.

The Province of Quebec supported that view.

The Province of Ontario, on the contrary, contended

(*a*) That the liability, if any, was of the Province of Canada, in respect of which Ontario, as a separate province, has no liability in any case, except, if at all, conjointly with Quebec.

(*b*) By s. 13 of the award of September 3, 1870, Ontario was expressly freed from any liability separately from Quebec.

(*c*) That no trust exists in respect of the said lands; that the Indian title was extinguished in order that the lands might be opened up for settlement, and that patents from the Crown might issue therefor to purchasers; and that the annuities or augmentations are not liens on the lands.

(*d*) That the Dominion, at the Union, or at or before the passing of the Act 36 Vict. c. 30, included, or is deemed to have included, the liability in the amount of the debt of the Province of Canada assumed by the Dominion, and of which Ontario and Quebec were thereby relieved.

The arbitrators on the question of liability, apart from the amount, awarded as follows:—

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of

J. C. 1896

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario, and that this burden has not been in any way affected or discharged."

"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the Union, any payments properly made are to be charged against the Province of Ontario in the Province of Ontario Account, as of the date of payment to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

The Province of Ontario appealed from the above findings, and a majority of the Supreme Court (Strong C.J., Taschereau and Sedgewick JJ.) allowed the appeal, Gwynne and King JJ. holding that it should be dismissed.

Accordingly the award was varied by striking out the 9th paragraph, and by substituting for the 6th paragraph the following:—

"The ceded territory mentioned became the property of Ontario under British North America Act, 1867, s. 109, absolutely, and free from any trust, charge, or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities, upon the condition in the treaties mentioned."

From this judgment the Dominion of Canada and the Province of Quebec appealed.

Cohen, Q.C., and *Loehnis*, for the Dominion of Canada, contended that the award of the arbitrators should be restored and the judgment of the Supreme Court reversed. Upon the construction of the treaties they contended that the covenant to pay the increased annuities was in effect and by necessary implication a covenant to pay out of the lands surrendered, being in terms a covenant to pay should the surrendered lands produce such an amount as would enable the Government to pay without incurring loss. Assuming this to be the right construction of the covenant, it was contended that at the time of the confederation a trust existed in respect of the lands surrendered, and an interest of the Indians therein, within the

meaning of s. 109 of the Act of 1867, when properly construed. That section is not so limited in its application as to include only a direct charge or lien upon or an interest in lands enforceable by legal process. It applies to a trust or interest created by the Crown to be recognised and carried out by the Crown. Accordingly, the lands having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians should be observed and carried out by that province. The province got the benefit of the increased value and profits of the land, and it was equitable that it should bear the burden of any increased annuities resulting from those increased profits under the terms of the treaties. Reference was made to *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2); *Kinloch* v. *Secretary of State for India in Council* (3); *Rustomjee* v. *Reg.* (4) With regard to the 13th clause of the earlier award of 1870, Ontario was not intended to be thereby freed from any liability to the Dominion for annuities to Indians in consideration of the lands surrendered. It merely meant that, as between the respective provinces, lands of this kind held by one province should be freed from claims of all other provinces. If it was intended to exclude a claim in respect of the Indians, or based upon a trust within s. 109, it was ultra vires the arbitrators.

Angers, Q.C., and *J. S. Hall, Q.C.*, for the Province of Quebec, contended to the same effect.

Blake, Q.C., *Haldane, Q.C.*, and *Irving, Q.C.*, for the respondent, the Province of Ontario, contended that the award had been rightly amended or reversed by the Supreme Court. According to the award, the liability for the increased annuities, so far as it had become by the happening of the prescribed event a present liability before the Union, was part of the debt of the late Province of Canada to be borne by Ontario and Quebec jointly. Then the award drew the distinction, that so far as that liability had not come into existence as a present liability before the Union, it was not a debt of the late Province of Canada, but a charge on the surrendered lands to which

(1) (1883) 8 App. Cas. 767.
(2) (1888) 14 App. Cas. 46.
(3) (1882) 7 App. Cas. 619.
(4) (1876) 2 Q. B. D. 69.

J. C.
1896
ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.
ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

Ontario became liable as the beneficial owner thereof. Reference was made to s. 111 of the Act of 1867, and it was contended that the liability to pay augmentations of the annuities was included in the "debts and liabilities" for which the Dominion became answerable under that section. The award admits that principle as regards such of the liabilities as had matured into debts before the Union. But the rest of the liabilities were created before the Union, and it was immaterial at what particular date they matured into debts. No distinction under s. 111 can be drawn between the two sets of liabilities. Recourse for all such liabilities must be had by the Dominion against the two provinces jointly. Then, as regards a charge or trust affecting the lands, it was not the intention of the authorities who concluded the treaties of 1850 to create charges or trusts in favour of the Indians affecting the surrendered lands or their proceeds to answer the annuities. Nor does the language of the treaties bear out that contention. The intention was to create liability on the part of the Province of Canada, party to the treaties, to pay out of its general revenue. Even if there were a trust or interest established in the lands it would exist solely for the benefit of the Indians, and would not affect the liabilities either of the old Province of Canada and the Dominion or of the various governments as between themselves in the ultimate adjustment of their accounts. The Supreme Court, moreover, were right in holding that this question had already been decided in favour of Ontario by the award of 1870 under s. 142 of the Act of 1867.

Cohen, Q.C., replied.

1896
Dec. 9.

The judgment of their Lordships was delivered by

LORD WATSON. In the year 1850 the Ojibeway Indians inhabiting the Lake Huron District, and the Indians of the same tribe inhabiting the Lake Superior District, entered into separate treaties with the Governor of the Province of Canada, acting on behalf of Her Majesty and the Government of the Province, for the cession of certain tracts of land, which had until that time been occupied as Indian reserves. As consideration for these surrenders, a sum of money was immediately

paid under each treaty; and a promise and agreement were given by the Governor, as representing the Crown and the provincial Government, to pay a perpetual annuity, in the one case of 600*l.*, and in the other of 400*l.* Both treaties contained the further promise and agreement that, in case the territory ceded should at any future period produce an amount which would enable the Government of the Province, without incurring loss, to increase these annuities, then and in that case the same should be increased from time to time, provided that the amount paid to each individual should not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order. Provision was also made for a proportional abatement of the annuities, in the event, which has not yet occurred, of the Indian population of either district becoming diminished in number below a specified limit.

The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased. In 1867, under the Act of Union, the Province of Canada ceased to exist, having been divided by that statute into two separate and independent provinces, Ontario and Quebec. Until the time when that division became operative, the Indian annuities payable under the treaties of 1850 were debts or liabilities of the old province, either present, future or contingent.

There are four sections in the Act of 1867 (ss. 109, 111, 112 and 142) which relate to the incidence, after Union, of the debts and liabilities of the old province. Those clauses contain the whole provisions of the Act upon that subject; and it is upon their construction that the decision of this appeal must ultimately depend. They distribute these debts and liabilities into two classes, the one being payable in the first instance by the Dominion, with a right of indemnity against Ontario and

J. C.
1896

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

Quebec, and the other being directly chargeable either to Ontario or to Quebec.

Sect. 111 enacts, in general terms, that the Dominion of Canada "shall be liable for the debts and liabilities of each province existing at the Union." Sect. 112 enacts that Ontario and Quebec conjointly shall be liable to the Dominion for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of 5 per cent. per annum thereon. Then, by s. 142, provision is made for the apportionment of the excess of these conjoint liabilities over the sum specified between Ontario and Quebec.

The enactments of s. 109 relate to the lands, mines, minerals, and royalties from which the territorial revenues of the old province were derived. It assigns to Ontario and Quebec, respectively, such of these sources of revenue as are locally situated within the limits of each of these new provinces, together with all proceeds thereof which at the date of Union had become due and payable to the Province of Canada. But it is made an express condition of the transfer that the property transferred shall be "subject to any trusts existing in respect thereof, and to any interest other than that of the province (i.e. of Canada) in the same."

The beneficial interest in the territories ceded by the Indians under the treaties of 1850 became vested, by virtue of s. 109, in the Province of Ontario. So far as appears, the perpetual annuities of 600*l.* and 400*l.* were duly paid by the old province; and it was matter of admission, in the course of the argument upon this appeal, that, some time after the Union, the value of these annuities was capitalised, and, with consent of all the parties interested, added to the debts and liabilities which were assumed by the Dominion under the provisions of s. 111. The Indians do not seem to have become aware of the full extent of the rights secured to them by treaty, until the year 1873, when they for the first time preferred against the Dominion a claim for an annual increase of their respective annuities from and after the date of the treaties, upon the ground that, during the whole period which followed, the proceeds of the surrendered

lands had been so large as to enable the stipulated increase to be paid without involving loss. The Dominion Government, who maintained then, as they do now, that the Province of Ontario is directly liable to the Indians for any such increase, under the provisions of s. 109, intimated the claim to that province, when its Government admitted that the condition had been satisfied upon which the increased amounts became due and payable, but disputed liability, upon the ground that the claim was one which fell in the first instance upon the Dominion, with recourse against Ontario and Quebec jointly. It was ultimately arranged that the Government of the Dominion should from and after that date and in the meantime continue to pay these increased allowances as they became due to the Indians, until the question of liability was determined.

It appears that many questions have arisen from time to time since that arrangement was made with regard to the debts and liabilities of the Province of Canada at the time of the Union; and these had the effect of delaying the final adjustment of the account contemplated by s. 112, the object of which is to ascertain and fix the precise balance of which Ontario and Quebec are made conjointly liable to relieve the Dominion. With the view of accelerating that adjustment, three statutes, in terms identical, were in the years 1890 and 1891 passed by the respective Legislatures of Canada, of Ontario, and of Quebec, sanctioning the appointment of three judges as arbitrators for the purpose of finally determining various matters which are therein specified—including all questions which had arisen or might thereafter arise "in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec," concerning which no agreement had previously been arrived at.

In terms of, and under the authority of, these statutes a deed of submission was entered into between the Governments of Canada, Ontario, and Quebec, and arbitrators were duly appointed. The Dominion submitted to them a claim against Ontario, (1.) for the increase of Indian annuities (which had not been paid) from the date of Union until 1874, and (2.) for

J. C.
1896
ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.
ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

the increased amounts which had been paid to the Indians between 1874 and 1892, with interest from the several dates of disbursement. The claim was urged, mainly upon the ground that the treaty stipulations giving the Indians a right to an increase of annuity either constituted a trust burdening the surrendered lands and their proceeds, within the meaning of s. 109, or created an interest in the same, other than that of the old province, within the meaning of the same section. Quebec, having an obvious interest in the success of the claim, which would exclude any demand against its revenues under s. 112, maintained before the arbitrators the same view which was put forward by the Dominion.

The learned arbitrators, in February, 1895, issued an award, by the 6th article of which they found "that the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario; and that this burden has not been in any way affected or discharged." By a clause in the statutes of 1890 and 1891 it is enacted that when the arbitrators proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either party, "and the award shall be subject to appeal so far as it relates to such decision to the Supreme Court, and thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal." The concluding part of that enactment ignores the constitutional rule that an appeal lies to Her Majesty, and not to this Board; and that no such jurisdiction can be conferred upon their Lordships, who are merely the advisers of the Queen, by any legislation either of the Dominion or of the provinces of Canada. By another clause in these Acts it is provided that, in case of an appeal on a question of law being successful, the matter shall go back to the arbitrators, for making such changes on the award as may be necessary, or an Appellate

Court may make any other direction as to the necessary changes.

The learned arbitrators, by a supplementary order dated March 26, 1895, certified and declared that, in respect of the question as to the liability of the Province of Ontario for the increased annuities paid by the Dominion to the Indians since the Union, they proceeded upon their view of a disputed question of law. Their decision upon that point was accordingly brought under the review of the Supreme Court of Canada by an appeal at the instance of Ontario in which the Dominion and Quebec appeared as respondents. The Supreme Court was divided in opinion. Two of the learned judges, Gwynne and King JJ., held that the award ought to be maintained and the appeal dismissed; but the majority, consisting of Strong C.J., with Taschereau and Sedgewick JJ., ordered and adjudged that "the award should be varied by substituting for paragraph 6 thereof the following:—

"The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely and free from any trust, charge or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned." The Supreme Court, by the same majority, ordered the award to be further varied by striking out paragraphs 7 and 9; and directed that the respondents should pay his costs to the appellant. Against that judgment, both the Dominion and Quebec have presented appeals which have been admitted by Her Majesty in Council.

The findings which have been substituted, by the order of the Supreme Court for those contained in the 6th paragraph of the award raise the only substantial question which has been presented for their Lordships' decision. The directions to delete paragraphs 7 and 9 of the award are amendments merely consequential upon the previous findings being sustained, and must stand or fall with these findings. In other words, the main and only question between the parties is, whether liability for the increased amount of the Indian annuities

J. C. 1896

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

stipulated by the treaties of 1850 is so connected with or attached to the surrendered territory and its proceeds, in the sense of the concluding enactments of s. 109, as to follow the beneficial interest, and form a charge upon it in the hands of the province.

The enactments of s. 109, upon which the appellants rely, are to the effect that the beneficial interest in the property held by the Crown of which that section disposes shall belong to the province in which the property is situated, subject always "to any trusts existing in respect thereof, and to any interest other than that of the province in the same." The transfer of beneficial interest which the clause operates is not confined to lands, but extends to all proceeds thereof which had become due and payable to the old province before Union. There is nothing in the Record of these appeals to shew whether any, and, if so, what amount of proceeds were at the time of Union due and payable, and therefore came into the possession of the new Province of Ontario. The claim made by the Dominion, and sustained by the arbitrators, is therefore in substance, that the Indian annuities form a charge upon the lands, and their proceeds arising after Union, with which s. 109 does not deal, except in so far as they are implied or included in the word "lands."

The expressions "subject to any trusts existing in respect thereof," and "subject to any interest other than that of the province," appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word "trust" was meant by the Legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, "an interest other than that of the province in the same" appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the

beneficial interest of the old province. Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly if not wholly based upon the provisions of s. 109 with respect to trusts.

Two of the learned arbitrators explained at some length the reasons by which they were influenced in arriving at the conclusion which they embodied in the 6th paragraph of their award. They start from the proposition that the treaties of 1850, being in the nature of international compacts, ought to be liberally construed. That rule when rightly applied, in circumstances which admit of its application, is useful and salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity. Starting from the proposition already stated, Mr. Chancellor Boyd arrives, upon equitable and benignant principles, at the conclusion that the treaties of 1850 contain "an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario." Burbidge J., by a similar process of reasoning, arrived at substantially the same result, which was concurred in by Sir Louis Napoleon Casault.

Their Lordships are of opinion that the language of the treaties in question does not warrant the conclusion that payment of the original annuities and of their augmentations was to be derived from different sources, as the learned arbitrators appear to have held. The promise and agreement upon which the obligation for their payment rests is, in both cases, expressed in precisely the same terms. Their Lordships

J. C.
1896
ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. ATTORNEY-GENERAL FOR ONTARIO.
ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR ONTARIO.

entirely agree with the following observations made by King J., one of the minority in the Supreme Court: "Practically it does not now, and it never did, make any difference to the Indians, whether they were declared to have an interest in the proceeds of the land or not. Their assurance would be equal in either case." Even at the present time, and in view of the change of circumstances introduced by the Act of 1867, their Lordships think it must still be matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the Province of Ontario. But it is clear that, for the purposes of the present question, the construction of the treaties must be dealt with on the same footing as if it had arisen between the Indians and the old Province of Canada; and it must be kept in view that, whilst the Indians had no interest in making such a stipulation, an agreement by the province to make a particular debt a charge upon a particular portion of its annual revenues, or an agreement to hold such portion of its revenue in trust for the future payment of that debt, might have occasioned considerable inconvenience to the Government of the province. Why, in these circumstances, a liberal construction should be resorted to for the purpose of raising an equitable right in the Indians which is of no pecuniary advantage to them, and to which the province did not, according to the ordinary and natural construction of the instruments, consent, and cannot with any degree of probability be presumed to have consented, their Lordships are at a loss to understand. The so-called equity appears to have been conjured up for the doubtful purpose of construing the provisions of s. 109 with an amount of liberality which the ordinary canons of construction do not admit of.

It may not be out of place, in this connection, to refer to the general arrangements made by the Government of the Province of Canada for the application of part of its revenues in payment of annuities to the Indian tribes. Before 1850 there had been many cessions of reserved territory by its Indian occupants, in respect of which consideration was due

by the province in the shape of annual payments. These annuities, then amounting to 6666*l.* currency, were by the Provincial Act, 9 Vict. c. 114, charged upon the Civil List of the province; and an annual sum of 39,245*l.* 16*s.* currency was granted to the Crown, which was at that time the administrator of Indians and Indian affairs, out of "the Consolidated Revenue Fund of this province," for the purpose of paying these annuities, and other charges included in Sched. B. of the Act. And there is no evidence to shew that, during the existence of the Province of Canada, the annuities which became payable under the two treaties of 1850 were dealt with on any other footing, or paid out of any other fund than the general revenues of the province.

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities. They will, accordingly, humbly advise Her Majesty that the judgment of the Supreme Court of Canada ought to be affirmed, and both appeals dismissed. Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here. The appellants must, therefore, pay to the respondent his costs of these appeals.

Solicitors for both appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.*
1896
Nov. 19;
Dec. 9.

THE MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA . . } APPELLANT;

AND

PEARSON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Administration and Probate Act, 1890, *s.* 97—*Valuation of Testator's Estate—Bank Deposit Receipts—Liability on Bank Shares.*

Held, that in a statement of a testator's estate under s. 97 of the Administration and Probate Act, 1890, bank deposit receipts should be valued at the price which they would fetch in the market, and not according to the amounts appearing on the face of them to be payable; also, that sums payable in respect of bank shares at the times mentioned in various schemes for the reconstruction of those banks are debts of the deceased, and may be deducted from the sum total of the assets in order to ascertain the balance liable to probate duty.

APPEAL from an order of the Supreme Court (Nov. 12, 1894), made on a special case stated by the appellant for its opinion, under s. 98 of the Administration and Probate Act, 1890.

The two questions raised by the case, which related to the mode in which certain items included as testator's assets in a statement made by his executors under s. 97 should be treated, are fully set forth in the judgment of their Lordships.

Haldane, Q.C., and *Bray*, for the appellant.

Cozens-Hardy, Q.C., *Byrne, Q.C.*, and *T. L. Wilkinson*, for the respondents.

1896
Dec. 9.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The respondents are the executrix and executors of the will of the Hon. William Pearson, who died on August 10, 1893. Probate of his will having been

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

granted by the Supreme Court on September 20, 1893, to the respondents, they filed a statement of the estate in Victoria in the office of the Master in Equity, pursuant to s. 97 of the Administration and Probate Act, 1890. Upon this statement two questions arose between the Master in Equity and the respondents; and the former, in accordance with s. 98 of the same Act, stated a special case for the opinion of the Supreme Court. The first question related to five deposit receipts of the City of Melbourne Bank, which, but for a difference in the dates and the times when due, were all in the following form: "Deposit receipt in the City of Melbourne Bank, Limited, for 900*l.* dated 16th June 1893 due 16th June 1898 at 4½ per cent. payable half-yearly valued at 15*s.* in the £ . . . 675*l.*" These items in the statement are denoted by the letters (*a*) to (*e*), and the question with respect to them is:—

"As regards items (*a*) to (*e*) inclusive the market value of the deposit receipts being less than the principal sums appearing on their face as payable, should the said principal sums be treated for the purposes of the said statement as the value of the deposit receipts? Or may the executors treat the price which the said deposit receipts would fetch in the market as being the value for the purposes of the said statement?"

The Supreme Court in answer to this question said that the principal sums should not be treated for the purposes of the statement as the value of the deposit receipts, and that the executors might treat the price which they would fetch in the market as being the value.

The second question related to shares in the Colonial Bank of Australasia, the City of Melbourne Bank, the Commercial Bank of Australia, and the Bank of Victoria, denoted in the statement by the letters (*f*), (*g*), (*h*), (*i*), and there said to be of "No market value." The testator at the time of his death held these shares as ordinary shares, in pursuance of certain schemes of arrangement, and there then remained capital not paid up in respect of the shares in the Colonial Bank of Australasia 6*l.* 10*s.* per share, of the shares in the City of Melbourne Bank 2*l.* 10*s.* per share, of the shares of the Commercial Bank of Australia 5*l.* 15*s.* per share, and of the shares in the Bank of

J. C.
1896
MASTER IN EQUITY OF SUPREME COURT OF VICTORIA v. PEARSON.

Victoria 7*l.* 10*s.* per share. There was then a liability in respect of the shares in the Colonial Bank of Australasia to the amount of 2*l.* per share in respect of the scheme of arrangement relating to that bank, payable at the times mentioned in the scheme. There were also a similar liability in respect of the shares in the City of Melbourne Bank to the amount of 1*l.* 5*s.* per share; a similar liability in respect of the shares in the Commercial Bank of Australia to the amount of 5*l.* 15*s.* per share; and a similar liability in respect of the shares in the Bank of Victoria to the amount of 2*l.* 10*s.* per share. In the case it is stated that at the time of the testator's death the shares in these banks had not any market value, and at that time it would be necessary for the executors to pay money in order to induce persons to take the shares off their hands.

The second question is as follows: "As regards items (*f*), (*g*), (*h*) and (*i*), are the sums which are payable in respect of the bank shares at the times mentioned in the several schemes of reconstruction debts due by the deceased within the meaning of s. 97 of the Administration and Probate Act, 1890? And if not, is any deduction to be made in the said statement in respect of the said sums respectively? And if so, how is the deduction to be assessed?"

The answer of the Supreme Court to this question is that as regards (*f*), (*g*), (*h*) and (*i*) the sums which are so payable are debts due by the deceased within the meaning of s. 97.

The present appeal is from an order of the full Court of the Supreme Court of November 12, 1894 (entered up on February 16, 1895), which contains these answers.

Their Lordships agree with the learned judges of the Supreme Court in their answer to the first question. In their Lordships' opinion the price which the deposit receipts would fetch in the market was to be treated as their value for the purposes of the statement. This, indeed, was not disputed on the argument of the appeal.

The second question involves three separate queries, the first of which admits, in their Lordships' opinion, of only one answer, which has been given by the Court below. It is clear that all sums which at the time of the deceased's demise were

payable by him at future dates, under these reconstruction schemes, are debts of the deceased within the meaning of s. 97 of the Act of 1890. Their Lordships may add that in their opinion the amount of these debts is the amount actually payable, under deduction (it may be) of any interest which might accrue upon the money required for their payment in the hands of the executors, before payment is actually made. Sect. 97 plainly directs that such amount is to be deducted from the sum total of the assets in ascertaining the balance of assets liable to probate duty.

The second and third queries are alternative, and are not submitted at all, except in the event of the first query being answered in the negative. In that event, which has not occurred, the second query raises the question whether, if these future debts are not debts within the meaning of s. 97, any deduction ought to be made in the statement in respect of them; and the third query, which is really a part of the second, inquires, "If so, how is the deduction to be assessed?"

Counsel for the appellant endeavoured to raise under these second and third queries the question whether, in valuing the shares referred to in the first question, the obligation of the executors to pay the calls made under the reconstruction schemes ought to be taken into account. They argued that if the executors, in realizing the shares, undertook to communicate to the purchasers the benefit of the obligation incumbent upon them, they would enhance the value of the shares beyond nil, which would be their market value, if the purchaser had to pay the calls. And they further argued, with much plausibility, that the executors could not in fairness treat these calls as debts which they must pay, and on the other hand estimate the value of the shares as if they were under no such liability.

The difficulty which their Lordships have felt in dealing with that argument arises from the fact that it does not appear to be raised by the special case, which is so framed as to exclude the question. Apart from the shape of the second question, which only enables their Lordships to deal with the second and third queries in the event of the first query being

J. C. 1896 — MASTER IN EQUITY OF SUPREME COURT OF VICTORIA v. PEARSON.

negatived, these queries do not necessarily relate to the valuation of assets; and the case contains no statement of fact which indicates that any such question had arisen and was meant to be submitted. The Court below has, in consequence, declined to dispose of the question, which they thought, so far as their Lordships see rightly, was not before them.

Their Lordships, in these circumstances, are of opinion that there is no course open to them, except to humbly advise Her Majesty to affirm the order of November 12, 1894, and to dismiss the appeal. The appellant will pay the respondents' costs of the appeal.

Solicitors for appellant: *Freshfields & Williams.*
Solicitor for respondents: *W. Wilding Jones.*

J. C.* 1896 — *Nov.* 19; *Dec.* 9.

[PRIVY COUNCIL.]

Ex parte RENNER.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY, WESTERN PROVINCE.

Barrister and Solicitor—Order striking off the Roll reversed—Practice.

Where the Court, having rightly acquitted a barrister and solicitor of fraudulent intent in having antedated a mortgage deed which he had drawn for the mortgagor, and in having inserted in it the sum of 250*l.* for 150*l.*, nevertheless removed his name from the roll for having put the mortgage in evidence on behalf of the mortgagee in an interpleader suit without informing the Court that the date was false:—

Held, that the second charge fell with the first, there being no evidence that the appellant had any reason to believe that the mortgagee had not, as he stated in evidence, advanced the consideration mentioned in the deed at or before the date it bore; and it also appearing that it was immaterial to the question at issue on the interpleader whether the deed was antedated or not.

APPEAL from an order of the Supreme Court (Sep. 20, 1894), directing the name of the appellant to be struck off the roll of the Court.

Present: LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1896
Ex parte RENNER.

By Order in Council dated March 6, 1894, the appellant was, on petition, given special leave to appeal from the above order. The appellant, in accordance with further leave to that effect, filed affidavit evidence as to what took place in the Court below. The judges also, in accordance with leave, made written observations on the appellant's petition.

Sect. 79 of the Supreme Court Ordinance, 1876, provides: "The full Court shall have power for reasonable cause to suspend any barrister or solicitor from practising within the jurisdiction of the Court during any specified period, or to order his name to be struck off the roll of the court, and any judge shall have power to suspend any barrister or solicitor temporarily pending a reference to and the confirmation or disallowance of such suspension by the full Court."

The facts are stated in the judgment of their Lordships.

Sir E. Clarke, Q.C., and *Vernon*, for the appellant, contended that no reasonable cause was shewn for the order made. There was no evidence of Eccra Kwaku having made any false statement at the hearing of the interpleader proceedings in 1887; still less that such false statement was relied on by the Court and was in any way material. The original transaction with respect to the mortgage was rightly found to be without fraudulent intent; and it followed that what took place at the interpleader hearing was also without fraudulent intent. On the evidence it appeared that the antedating was immaterial.

1896
Dec. 9.

The judgment of their Lordships was delivered by

LORD WATSON. The appellant was called to the English Bar by the Honourable Society of Lincoln's Inn in April, 1883; and thereafter, in the year 1884, he was duly admitted as a barrister and solicitor of and enrolled as a practitioner before the Supreme Court of the Gold Coast Colony. The circumstances which led to the proceedings in which this appeal is taken occurred in or about the months of September, 1886, and February, 1887, and may be shortly referred to here.

During the first of these periods the appellant was employed by one Joseph Wilson Sackey to prepare on his behalf as

J. C. 1896 *Ex parte* RENNER.

mortgagor a mortgage of a dwelling-house and parcel of land in Elmina belonging to him, in favour of a native chief, Eccra Kwaku, as mortgagee. Special instructions were given by Sackey that the consideration to be inserted in the mortgage deed was to be the sum of 250*l.*, advanced to him by the mortgagee on or before the date of the deed; and also that the deed was to be antedated, the date to be inserted being September 26, 1884. The appellant prepared the deed in accordance with those instructions, and sent it to his client; but he was not present at, and took no part in, its execution and its delivery to the mortgagee. There is no evidence in the proceedings before us, and forming the Record in the Court below, as to the precise date upon which the mortgage deed prepared by the appellant was delivered by him to Sackey; but it is shewn that its delivery and its execution must both have been subsequent to September 20, 1886.

It now appears that, at the time when instructions were given for the preparation of the mortgage, one John F. Brooks had obtained a judgment against Sackey, the mortgagor, for the sum of 921*l.* 3*s.*, payable by instalments of 250*l.* per quarter, the first instalment being payable on December 20, 1886. The judgment creditor became entitled to recover that debt by attachment and sale of the debtor's property real or personal.

Mr. Brooks did not take any steps to levy his debt from the property included in the mortgage to Eccra Kwaku until January, 1887. After that fact came to his knowledge Eccra Kwaku, on January 29, 1887, instituted an interpleader suit, with the object of having the property mortgaged to him released from the attachment; and in that proceeding the appellant acted as his solicitor. The case went to trial before MacLeod C.J., when the mortgagee gave evidence in his own favour, being examined by the appellant as his counsel and solicitor. In answer to questions put to him by the appellant, he stated the consideration which had been given by him for the mortgage, and also stated, "I have the mortgage, and produce it, marked A, dated the 26th September, 1884." As might have been expected, after production of the document, which bore the date assigned to it, no questions were put to

J. C.
1896
Ex parte
RENNER

the witness by counsel for Mr. Brooks as to the actual date of its execution; but the witness was fully cross-examined as to the consideration given for the deed. The learned judge, on considering the evidence, released the mortgaged property.

Eccra Kwaku, the mortgagee, died in 1890; and nothing was heard of these transactions, or of the appellant's connection with them, until upwards of seven years after their occurrence. In April, 1894, Kwasie Mensah, administrator of the deceased, brought an action against F. H. Kwaku, one of the sons of the deceased, for certain sums alleged to be due by him to the estate, in which the appellant acted as counsel and solicitor for the plaintiff. On July 27, 1894, Mr. Roberts, who was acting as counsel and solicitor for the defendant, moved for a rule nisi calling upon the appellant to shew cause why he should not be suspended for a specified period from practising within the jurisdiction of the Court, temporarily, pending a reference to and the confirmation or disallowance of such suspension by the full Court; or why, in the alternative, the matters charged against him should not be referred to the full Court, in order that his name might be struck off the roll of the Court. The suit was at that time in dependence before Redwar J.; and the application was made in terms of s. 79 of the Supreme Court Ordinance, 1876, which gave the learned judge the power of temporary suspension, subject to confirmation or disallowance by the full Court, with the alternative of remitting the whole matter to the consideration and determination of the full Bench. The motion of Mr. Roberts was supported by affidavits, which were met by counter-affidavits; and a good deal of other procedure took place, which their Lordships think it unnecessary to notice, because, on August 31, 1894, Redwar J., being of opinion that the charges preferred against the appellant were of too grave a character to be dealt with by him, discharged the rule which he had granted, and referred the whole matter to the full Court.

On September 12, 1894, Mr. Roberts appeared before the full Court of the Colony, consisting of Hutchinson C.J. and Redwar J., and at the request of the Court formulated the charges which he had preferred against the appellant. These

J. C. 1896 *Ex parte* RENNER.

were: (1.) "That Renner about October, 1886, drew a mortgage for J. W. Sackey, and, with intent to defraud, dated it 26th September, 1884; and also, with the same intent, inserted the sum of 250*l.* instead of 150*l.*"; (2.) "That at the hearing of an interpleader summons at Cape Coast, before MacLeod C.J., Renner put the mortgage in evidence and did not inform the Court that the date of it was false, and in the result the Court, on the ground that the date 1884 was the true date, gave judgment against the judgment creditor on that summons." On the same occasion Mr. Roberts explained these charges, and read a number of affidavits which had been produced by himself and by the appellant.

The matter came again before the full Bench on September 20, 1894, when the appellant examined several witnesses and addressed the Court in his own behalf. On the same day the learned judges, having considered the affidavits and other evidence oral and documentary which had been submitted to them, delivered their judgment in the matter. They held that the first charge was not, and that the second charge was, proved; and in respect of the latter finding they ordered the name of the appellant to be struck off the roll of the Court. With reference to the second charge, the learned judges, after quoting the evidence given by Eccra Kwaku in the interpleader suit, observed: "The judge believed the statement of Eccra Kwaku and gave judgment in his favour. Mr. Renner at the time this statement was made knew that it was false, because he had himself drawn the deed some time after September, 1886, and it is impossible that he should have forgotten it; and he knew that the statement must of necessity influence the result. If Mr. Renner had informed the Court that the statement made by his client was false, the judge would, as a matter of course, have disbelieved the whole of the man's evidence; and unless the rest of his evidence was corroborated by other testimony, would not have believed that he had lent any money at all to the judgment debtor, and would therefore have disallowed the claim. We are satisfied that Mr. Renner was a party to the deception practised upon the Court."

Their Lordships cannot avoid noticing the intimate connection

which exists between the two charges which were before the Court. The first accuses the appellant of having antedated the mortgage with intent to defraud some one, it is not said whom. But it is impossible to peruse the affidavits and other documents laid before the Court by Mr. Roberts without seeing that the object of the fraud imputed to the appellant was to enable Sackey to defeat the just claims of Brooks, his judgment creditor, by creating a fictitious incumbrance upon his real estate, which might otherwise have been taken in execution, and made available for payment of his debt. The judgment debt did not of itself constitute a charge upon the debtor's real estate; and the mortgage in question, if it represented a real transaction, would have been equally effective to exclude the judgment creditor if it had been dated in October, 1886, seeing that no attachment followed upon the judgment debt until January, 1887. There is no proof that, either at the time when the mortgage deed was prepared, or during the dependence of the subsequent interpleader suit, the appellant knew, or had any reason to believe, that the mortgagee had not (as he stated in the evidence given by him before MacLeod C.J. in February, 1887) advanced the consideration which the deed bears, at or before the date which he was instructed by Mr. Sackey to insert.

Sackey was examined as a witness in the interpleader suit of 1887, when he swore distinctly that the mortgagee had advanced 250*l.* in September, 1884. It is true that in the action of 1894, in which these accusations have been made against the appellant, Sackey denied that he had instructed the appellant to insert the sum of 250*l.* in the mortgage; but their Lordships can attach no credit to that statement, which is inconsistent with the terms of his letter to the appellant dated September 29, 1886, as well as with the fact that he accepted the mortgage deed as drawn in conformity with his instructions, and then proceeded to execute and deliver it to Eccra Kwaku, the mortgagee.

Their Lordships also think it necessary to observe that in the suit of 1894 the evidence taken before Redwar J. establishes that in the year 1884 sums amounting to 150*l.* and bearing

J. C. 1896 *Ex parte* RENNER.

interest at 50 per cent. were advanced to Sackey by Eccra Kwaku, the only dispute being whether the moneys so advanced belonged to the deceased chief, or came from his son, the plaintiff in the suit. There must therefore have been ample consideration to support the mortgage; and Brooks's claim in the interpleader could not have been legally sustained, whatever might have been the amount recoverable by the mortgagee in a redemption suit by the mortgagor or his creditors.

The sting of the second charge, when it is read in connection with the first, appears to their Lordships to consist in this, that the appellant, having previously aided Mr. Sackey's scheme to defeat his creditor by the preparation of a fraudulent mortgage, then proceeded to accomplish that scheme by misleading the Court as to the true character of the mortgage in the interpleader suit. The finding of the Court with respect to the first charge, of which their Lordships entirely approve, in their opinion completely alters the aspect of the second. In the view which according to that finding the appellant took, and was entitled to take, of the character of the mortgage, the actual date of the deed became of comparatively little importance. The material question was whether it represented a genuine transaction; and, upon that point, so far as appears, the appellant had no reason to entertain any doubt. His client Eccra Kwaku was fully examined by the counsel for the judgment creditor as to the consideration given by him for the mortgage; and it does not appear to their Lordships that MacLeod C.J. would have been justified in refusing to believe his evidence, and that of Sackey, if he had been made aware the mortgage was antedated. If the learned Chief Justice had, upon that ground, decided that no money was advanced by Eccra, his decision would have been contrary to the truth of the case. If he had thought further inquiry necessary, their Lordships are satisfied that it must have resulted in sustaining the mortgage, and rejecting the claim of the judgment creditor. There does not appear to them to be any room for the suggestion that the judgment of MacLeod C.J. proceeded upon the ground that the date 1884 was the true date of the mortgage, which is a very material part of the second charge.

It is much to be regretted that Mr. Roberts should have thought fit to prefer these serious accusations of fraud which constitute the first, and which, if true, would have given an ugly complexion to the second charge, without any sufficient ground, and after the lapse of more than seven years from the date of the transactions to which they relate—a circumstance which, in itself, exposed the appellant to great disadvantage in meeting them. Upon the whole matter they are of opinion that both charges have completely failed. They have not been informed what, if any, rule prevails in the Colony in regard to the institution and conduct of such proceedings; but it appears to them that, that if the conduct of this case had been with a responsible public officer, such as the Attorney-General for the Colony, the necessity for the present appeal might never have arisen.

Their Lordships in the preceding observations are not to be understood as expressing approval of the system of antedating documents. The practice, which is too common, involves a false assertion, and whilst it is in no case commendable, it is, in many circumstances, highly reprehensible. In the present case they are satisfied that, whatever may have been the original intention of Sackey in directing the mortgage to be antedated, it was not used by him for the purpose of defrauding the judgment creditor.

Their Lordships, in allowing this appeal to be brought, followed the usual course of directing that a copy of the order should be referred to the learned judges of the Court below for their observations, each of whom has made a communication on the subject to this Board. The observations of Hutchinson C.J. add nothing to the views which were expressed by the full Court in giving judgment. Redwar J., who, in the absence of his papers, adopted the somewhat singular course of refreshing his memory by a personal interview with Mr. Roberts, the instigator of these proceedings, adds nothing of consequence except a statement affecting the appellant's professional conduct in the year 1893, which it might have been necessary to take into account had the second charge been made out, but which, in the view which their Lordships take of that charge, is immaterial.

J. C. 1896 *Ex parte* RENNER.

Their Lordships will humbly advise Her Majesty to reverse the judgment and sentence appealed from, and to remit the case to the Supreme Court of the Gold Coast Colony, with directions to restore the name of the appellant to the roll of barristers and solicitors entitled to practise before that Court.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

J. C.* 1896 *March* 25; *Dec.* 16.

BENEFICED CLERK . . . . . APPELLANT;

AND

LEE . . . . . RESPONDENT.

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF LONDON.

Clergy Discipline Act, 1892, ss. 2, 12—*Simony—Immorality—Clerical Subscription Act*, 1865—*False Declaration against Simony.*

Held, that in order to punish the offence of simony in a clerk resort cannot be had to the provisions of the Clergy Discipline Act of 1892, but proceedings must still be taken under the Act of 1840. The immorality against which the Act of 1892 is directed is so defined by ss. 2 and 12 as to exclude simony from its scope:

Held, also, that a false declaration against simony under the Clerical Subscription Act of 1865 cannot be isolated from the charge of simony and brought within the scope of the Act of 1892.

APPEAL from a judgment of the Consistory Court of London (Dr. Tristram, Q.C.), dated Dec. 17, 1895, in a prosecution instituted at the instance of the Bishop of London through the respondent, under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), against the appellant for simony and for making a false declaration against simony, under the Clerical Subscription Act, 1865. The appellant denied the charges, and also the jurisdiction of the Court to entertain them, on the ground

* *Present:* LORD HALSBURY L.C., LORD WATSON, LORD HOBHOUSE, LORD DAVEY, SIR RICHARD COUCH, and SIR FRANCIS JEUNE. *Ecclesiastical Assessors:* THE ARCHBISHOP OF YORK, THE BISHOP OF MANCHESTER, and THE BISHOP OF ELY.

J. C.
1896
BENEFICED CLERK v. LEE.

that the offences charged were not offences against morality as that word is interpreted by the Act of 1892.

The Chancellor of the Consistory Court pronounced for the jurisdiction of the Court.

H. C. Richards, and *Soper*, for the appellant, contended that, the offences charged were not offences against morality within the meaning of the Act of 1892, and therefore were not cognisable in a prosecution instituted under that Act. They referred to its provisions to shew that the immorality against which that Act was directed related to conduct in matters of daily life which were repugnant to morality as ordinarily understood, and did not include offences against positive provisions of ecclesiastical law relating to official as distinguished from personal conduct. Reference was also made to the 40th Canon of 1603.

Sir W. Phillimore, *Q.C.*, and *A. Statham*, for the respondent, contended that, apart from the Act of Parliament, simony was an act of immorality, and must be considered to be within the scope of the Act of 1892. They referred to Cunningham on Simony (ed. 1784), c. 2, p. 3, *Whish* v. *Hesse* (1), the Canons of 1603, No. 75, s. 14 of the Act of 1892, and to *Fox* v. *Bishop of Chester*. (2) Even if simony is not triable under the Act of 1892, a false declaration is, and then simony may be tried incidentally.

Richards replied.

1896
Dec. 16.

The judgment of their Lordships was delivered by

LORD HALSBURY L.C. This is an appeal from a judgment of the learned Chancellor of the Diocese of London, and the only question for their Lordships' determination is whether the Chancellor had jurisdiction in the suit. The proceeding in question was under the Clergy Discipline Act, 1892, and the clerk in Holy Orders, who is now the appellant, was charged by the prosecutors with offences which may be shortly stated as follows. First, that he was guilty of simony in relation to his presentation and institution to a certain benefice; and,

(1) (1831) 3 Hagg. Eccl. 659.

(2) (1829) 6 Bing. 1.

J. C. 1896 BENEFICED CLERK v. LEE.

secondly, that he knowingly made a false declaration against simony under the Clerical Subscription Act, 1865, previous to his admission to the said benefice.

The learned Chancellor has in his judgment referred to many of the facts and circumstances connected with the case. But none of these facts or circumstances have yet been made the subject of proof, and their Lordships do not consider it necessary to consider whether the charges are well or ill founded. The question before them is in the nature of a plea to the jurisdiction, and for the purpose and the purpose only of considering this question they will assume that the charges can be substantiated.

Before the passing of the Clergy Discipline Act, 1892, every offence committed by a clerk in Holy Orders against the laws ecclesiastical was punishable only under the Church Discipline Act, 1840. The Act of 1892 withdrew from the cognisance of the Act of 1840 a certain class of offences, and the 2nd section of the Act of 1892 defines what that class is. The material words of the section for the present purpose are as follows: "If a clergyman . . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual" he may be prosecuted by the persons and in the manner by the Act prescribed.

The first question which their Lordships have to consider is whether the offence of simony, committed by a clerk in order to gain admission to a benefice, is "an immoral act," "immoral conduct," or "an offence against the laws ecclesiastical being an offence against morality," within the meaning of the above-quoted section of the Act.

Several of the propositions appearing in the judgment of the learned judge in the Court below and urged in argument before their Lordships appear to be beyond dispute. There is no doubt that the General Councils whose authority is accepted by the Church of England, Acts of Parliament, the Canons of 1603, judges, and writers of recognised position, have in all ages condemned simony in emphatic terms, and have applied

to it language not inappropriate to describe moral delinquency. Nor can it well be disputed that the offence of simony not only in its original significance of the purchase of spiritual authority, but in some instances of the later and more frequent application of the term to abuse of patronage, deserves reprobation, though it may be that the somewhat nice distinctions between the legal and illegal exercise of patronage introduced into our law have, to a certain extent, blunted the edge of moral censure on simony as an offence. But what their Lordships have to consider is whether the offence of simony falls within the language of the section above quoted.

Their Lordships think that this question should be looked at broadly. The term "immoral," except in the way presently to be mentioned, has not in the Act of 1892 any description or definition, nor is it a term carrying with it any precise legal significance. But it cannot, their Lordships think, be doubted that the object of the Act of 1892 was to provide a more ready and economical mode than that afforded by the Act of 1840, for punishing those offences which do not depend on disputable points of law, or on matters so highly controversial as doctrine and ritual, but which, in the consensus of general opinion, are acts of personal immorality, such as various forms of vice or dishonesty or other like conduct, of evil example generally, and especially so if committed by a person invested with sacred functions. Their Lordships do not think that simony can fairly be considered as falling within this category, and their view is confirmed by observing the definition, or rather perhaps extension, given to the term "immoral" by the Act.

It is provided in s. 12, "the expression 'immoral act,' 'immoral conduct,' and 'immoral habit' shall include such acts conduct and habits as are prescribed by the 75th and 109th Canons issued by the Convocation of the Province of Canterbury in the year 1603."

The language of these Canons denounces the offences which the 109th Canon sums up as "uncleanness and wickedness of life," but it goes further, and condemns acts and conduct hardly to be considered immoral, but certainly dangerous to the reputation, or unworthy of the character of ministers of religion.

J. C. 1896

BENEFICED CLERK v. LEE.

It appears to their Lordships that in thus applying and extending the use of the term "immoral" the Act shews that the intention was to confine its scope to offences of the kind referred to in these Canons. It is also to be remarked that no reference is made to that one of the Canons which deals with simony.

Their Lordships think, therefore, that in order to punish the offence of simony in a clerk resort cannot be had to the provisions of the Act of 1892, but that proceedings must still be taken under the Act of 1840.

There remains the charge of knowingly making a false declaration under the Clerical Subscription Act, 1865.

Their Lordships do not desire to indicate any doubt that a false statement made knowingly in order to gain some benefit is, whatever the subject-matter of the statement, and in every sense of the term, an immoral act. But it is a different question whether the declaration against simony made by a clerk under the Clerical Subscription Act, 1865, can be isolated from the charge of simony and brought within the provisions of the Act of 1892. Their Lordships think that this was not the intention of the Act. It is obvious that, were it otherwise, in every case in which a false declaration as to simony is charged it would be necessary to begin by determining whether simony in fact had been committed, and thus an offence would be tried indirectly which cannot be directly tried.

Their Lordships would further observe that the solemn declarations to be made by clergymen are not confined to the commission of simony. The 36th Canon requires a promise to be made, at ordination and institution, that the clergyman will use the form prescribed in the Book of Common Prayer and no other, and the Ecclesiastical Courts have more than once referred to a violation of this promise as aggravating the offence of clergymen found guilty of what are known as ritual offences: see *Sanders* v. *Head* (1); *Combe* v. *De la Bere*. (2) But if it be permissible to separate the charge of violating this promise from that of the commission of a ritual offence, and to proceed against a clergymen under the Act of 1892 for the violation of

(1) (1843) 3 Curt. 565. (2) (1881) 6 P. D. 157.

such promise, it is obvious that the Act would be used in a manner contrary to its expressed intention.

Their Lordships are, therefore, of opinion that the judgment of the Court below ought to be reversed, and the complaint against the appellant dismissed, and they will humbly advise Her Majesty accordingly. The respondent will pay the costs of the appellant of the appeal, and in the Court below.

J. C. 1896 BENEFICED CLERK v. LEE.

Solicitors for appellant: *W. Carpenter & Sons.*
Solicitors for respondent: *Houseman & Co.*

[PRIVY COUNCIL.]

BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO . . . . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR ONTARIO . . . . . } RESPONDENT.

J. C.* 1896 *Nov.* 17. 1897 *Feb.* 6.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO.

British North America Act, 1867, *s.* 92, *sub-ss.* 2, 9—*Powers of Provincial Legislature—Brewers' Licences—Revised Statutes of Ontario*, *c.* 194, *s.* 51, *sub-s.* 2—*Direct Taxation.*

Held, that the Liquor Licence Act (Revised Statutes of Ontario, c. 194), s. 51, sub-s. 2, which requires every brewer and distiller to obtain a licence thereunder to sell wholesale within the province, is intra vires of the provincial legislature—

(*a*) as being direct taxation within sub-s. 2, s. 92, of the British North America Act, 1867.

Bank of Toronto v. *Lambe*, (1887) 12 App. Cas. 575, followed.

(*b*) as comprised within the term "other licences" in sub-s. 9 of the same section.

APPEAL from a decision of the Court of Appeal for Ontario (Jan. 14, 1896), upon the questions stated in their Lordships'

* *Present:* LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

J. C. 1897

BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO v. ATTORNEY-GENERAL FOR ONTARIO.

judgment which were referred to that Court by the Lieutenant-Governor in Council under Ontario Act 53 Vict. c. 13.

Sect. 51 of the Liquor Licence Act (Revised Statutes of Ontario, c. 194), referred to in the first of the said questions, is as follows :—

"51.—(1.) Sects. 49 and 50 shall not prevent any brewer, distiller, or other person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having, or selling any liquor manufactured by him in any building wherein such manufacture is carried on, provided such building forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorized to be manufactured under such licence is sold by retail, or wherein is kept any broken package of such articles.

"(2.) Every such brewer, distiller, or other person shall also first obtain a licence to sell by wholesale under this Act the liquor so manufactured by him, when sold for consumption within this province, under which licence the said liquor may be sold by sample, or in original packages, in any municipality as well as in that in which it is manufactured; but no such sales shall be in quantities less than those prescribed in sub-s. 4 of s. 2 of this Act."

Sub-sect. 4 of s. 2 is as follows :—

"(4.) 'Licence by wholesale,' or 'Wholesale licence,' shall mean a licence for selling, bartering, or trafficking, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, ale, or beerhouses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel at any one time; and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles, of at least three half-pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

Sects. 49 and 50 of the said Liquor Licence Act are as follow :—

"49.—(1.) No person shall sell by wholesale or retail any

spirituous, fermented, or other manufactured liquors without having first obtained a licence under this Act authorizing him so to do; but this section shall not apply to sales under legal process or for distress, or sales by assignees in insolvency.

"(2.) No person, unless duly licensed, shall by any sign or notice hold himself out to the public as so licensed; and the use of any sign or notice for this purpose is hereby prohibited.

"50. No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors for the purpose of selling, bartering, or trading therein, unless duly licensed thereto under the provisions of this Act; nor shall the occupant of any such shop, eating-house, saloon, or house of public entertainment, unless duly licensed, permit any liquors, whether sold by him or not, to be consumed upon the premises by any person other than members of his family or employees, or guests not being customers."

The Court (Hagarty C.J., Burton, Osler, and Maclennan JJ.) answered the first two questions in the affirmative, and the third in the negative. The judgment followed a previous decision of the same Court in *Reg.* v. *Halliday.* (1)

E. Blake, Q.C., for the appellants, accepted the negative answer to the third question, but contended that the answers to the first two questions were erroneous. The licence referred to in the first question is not a licence for the regulation of trade, but purely for revenue purposes. It is issuable as of right to every brewer who applies, and on no conditions except the payment of a prescribed duty. So that the licensing system established is a mere machinery for laying on a duty or tax. It was contended that taxation of that kind was indirect, being, to cite language used in decisions of the Privy Council, "a duty which enters at once into the price of the taxed commodity," and also "a tax on a commodity which the brewer deals in, and can sell at an enhanced price to his customers": see *Bank of Toronto* v. *Lambe* (2); *Attorney-*

(1) (1893) 21 Ont. App. Rep. 42. (2) 12 App. Cas. 575.

J. C. 1897 BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO v. ATTORNEY-GENERAL FOR ONTARIO.

General for Quebec v. *Queen Insurance Co.* (1); *Attorney-General for Quebec* v. *Reed.* (2) Not being direct taxation, it is not within sub-s. 2 of s. 92 of the Act of 1867. The use of the machinery of licence does not validate it, for it does not come within sub-s. 9, not being of the same kind as the licences there mentioned. Besides, the Dominion Parliament has occupied the whole field of legislation on this subject, and in consequence has disabled the provincial legislature from interfering therewith. That Parliament has exclusive jurisdiction over the regulation of trade and commerce, the public debt, the raising of money by any mode of taxation. It has always regulated by statute the trade of manufacturing and wholesale vending of spirituous and fermented liquors. It has laid considerable duties thereon, created a rigorous system of inspection, supervision, management, and control of the business. It has provided for the issue of licences to manufacturers and vendors of the commodities authorizing them on certain conditions to make and sell. It is an interference with the powers of the Dominion for the province to step in and add to the conditions already prescribed by enacting that a provincial licence shall also be necessary. With regard to the second question, it was contended that the provincial legislature could not do so merely for the purpose of raising a revenue for provincial purposes. No object within provincial jurisdiction can be stated for which the legislature has power under these two sub-sections to require brewers and maltsters to take out such licences as are now in question and pay such tax. With reference to sub-s. 9, reference was made to *Severn* v. *Reg.* (3), and the authorities there cited.

Haldane, Q.C., and *Cartwright*, for the respondent, were not heard.

1897 *Feb.* 6.

The judgment of their Lordships was delivered by

LORD HERSCHELL. This is an appeal from a judgment of the Court of Appeal for the Province of Ontario upon certain

(1) (1878) 3 App. Cas. 1090. (2) (1884) 10 App. Cas. 141.
(3) (1877) 2 Can. S. C. R. 70.

questions referred by the Lieutenant-Governor in Council pursuant to the provisions of 53 Vict. c. 13.

The questions referred were the following :—

(1.) Is sub-s. 2 of s. 51 of the Liquor Licence Act (Revised Statutes of Ontario, c. 194), requiring every brewer, distiller, or other person duly licensed by the Government of Canada, as mentioned in sub-s. 1, to first obtain a licence under the Act to sell by wholesale the liquor manufactured by him, when sold for consumption within the province, a valid enactment?

(2.) Has the Legislature of Ontario power, either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction, to require brewers, distillers, and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, or other liquors, to take out licences to sell the liquors manufactured by them, and to pay a licence fee therefor?

(3.) If so, must one and the same fee be exacted from all such brewers, distillers, and persons?

The present appeal relates only to the answers given to the first two questions submitted.

The enactment, the validity of which is in question, requires every brewer and distiller to obtain a licence to sell wholesale within the province. The licence fee is imposed "in order to the raising of a revenue for provincial purposes." It is a uniform fee of $100 in all cases.

The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-sections of s. 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of sub-s. 2, or that the licence is comprised within the term "other licences" in sub-s. 9.

The question what is "direct taxation" within the meaning of sub-s. 2 does not come now before this Board for consideration for the first time. In the case of the *Bank of Toronto* v. *Lambe* (1) it was necessary to put a construction on those words. The Legislature of Quebec had imposed a tax on

(1) 12 App. Cas. 575.

J. C. 1897 BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO v. ATTORNEY-GENERAL FOR ONTARIO.

every bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or place of business. The question at once arose, Was this "direct taxation"? It was contended that the tax was not direct but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before their Lordships by the learned counsel for the appellants in the present case, were then pressed upon this Board in vain. The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of sub-s. 2.

Their Lordships are quite unable to discover any substantial distinction between the case of *Bank of Toronto* v. *Lambe* (1) and the present case. So far as there is any difference it does not seem to them to be favourable to this appeal.

Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

The definition referred to is in the following terms: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs."

In the present case, as in *Lambe's Case* (1), their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of

(1) 12 App. Cas. 575.

the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

It was argued that the provincial legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.

The view which their Lordships have expressed is sufficient to dispose of this appeal. But their Lordships were not satisfied by the argument of the learned counsel for the appellants that the licence which the enactment renders necessary is not a licence within the meaning of sub-s. 9 of s. 92. They do not doubt that general words may be restrained to things of the same kind as those particularised, but they are unable to see what is the genus which would include "shop, saloon, tavern" and "auctioneer" licences and which would exclude brewers' and distillers' licences.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* SIR JOHN GORDON SPRIGG . . . . APPELLANT;

1896

AND

July 24, 29. SIGCAU . . . . . RESPONDENT.

1897

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Feb. 26.

Pondoland Annexation Act, 1894, *s.* 2—*Construction—Extent of Legislative Power conferred on the Governor—Illegal Proclamation of arbitrary Arrest, Conviction, and Punishment.*

Sect. 2 of the Pondoland Annexation Act, 1894, gives authority to the Governor to add to the existing laws, already proclaimed and in force in the territories annexed, such laws as he "shall from time to time by proclamation declare to be in force in such territories":—

Held, that this section did not, according to its true construction, authorize the Governor to make new laws, but only to transplant to the new territories and enact there such laws as were already in force in other parts of the Colony.

In 1895 the Governor, "in virtue of powers vested in me by law," including the Act above mentioned, issued a proclamation which set aside the established law of Pondoland with respect to arrest, trial, conviction and punishment, and condemned the respondent untried and unheard to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the Governor.

In a petition for his discharge by the respondent, who had been arrested thereunder:—

Held, that the proclamation was ultra vires of any authority conferred upon the Governor by s. 2; or of any authority at all except that of an irresponsible sovereign, or of a supreme and unfettered legislature.

APPEAL by special leave from an order of the Supreme Court (July 30, 1895) directing the respondent to be forthwith discharged from custody.

The respondent, under the circumstances stated in the judgment of their Lordships, petitioned the Supreme Court on July 29, 1895, to inquire by what authority he was being detained in custody, and if the authority were not lawful to order his discharge.

* *Present:* LORD HALSBURY L.C., LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

The petition set forth that the respondent was chief of Eastern Pondoland, and was then confined in the lock-up at Kokstad under an order, alleged to have been given by W. E. M. Stanford, C.M.G., the chief magistrate for the territory of Griqualand East, in pursuance of a proclamation ordering the respondent's arrest and detention in custody issued by the Governor of the Cape Colony on June 11, 1895. It further stated that the respondent when he heard of the issue of the proclamation, and before its execution, decided to proceed to Kokstad, where he arrived on June 18, 1895; that immediately on arriving there he reported himself to the chief magistrate, was forthwith confined in the lock-up at Kokstad and placed under a strong guard, where, up to the date of the petition, a period of more than a month, he had been held a prisoner without having been brought to trial before a competent Court; that he had unwillingly and under protest been compelled to submit himself to an inquiry which did not even purport to be a judicial inquiry; and that not only had he not been brought to trial, but he had not even been charged before any resident magistrate, nor had any criminal proceedings of any kind been taken against him.

On the hearing before the Supreme Court it was argued on behalf of the Colonial Government that the proclamation dated June 11, 1895, had, by virtue of the Pondoland Annexation Act, 1894, s. 2, the force of a law, and that the respondent, being in custody in accordance with that proclamation, was lawfully imprisoned; it was also urged that the release of the respondent would have a most disastrous effect on the administration of the country. The Court, however, was of opinion that there was no lawful authority for the detention of the respondent, and ordered his immediate discharge.

Cozens-Hardy, Q.C., and *Mackarness*, for the appellant, contended that the proclamation had been promulgated under the provisions of the laws annexing the territories of the Transkei, Tembuland, Griqualand East, and Pondoland, and that, Kokstad being in the territory of East Griqualand, the proclamation had there the force of law. Reference was made to

J. C. 1897 SPRIGG v. SIGCAU.

Acts No. 38 of 1877, No. 3 of 1885, and No. 5 of 1894, and especially to s. 2 of the last-named Act, which provided that the territories of East and West Pondoland should be subject to such laws, statutes, and ordinances as had already been proclaimed by the High Commissioner, and such as after annexation to the Colony the Governor should from time to time by proclamation declare to be in force in such territories. There was a proviso to the said section that all such laws should be laid before both Houses of the Cape Parliament within fourteen days after the beginning of the Session of Parliament next after the proclamation thereof as aforesaid, and should be effectual, unless in so far as the same should be repealed, altered, or varied by Act of Parliament.

It was further contended that the Colonial Legislature was supreme within the Colony, and had power to deprive of his liberty any one properly subject to its jurisdiction. By the Constitution Ordinance of 1853 the Cape Parliament was given "authority to make laws for the peace, welfare and good government" of the Colony, and these powers were duly delegated to the Governor by Act No. 5 of 1894, who in pursuance thereof issued the proclamation under which the respondent was arrested and imprisoned. That Ordinance ought to receive a liberal construction: see *Riel* v. *Reg.* (1)

[THE LORD CHANCELLOR. To arrest with a view to trial is one thing, but to combine in one act arrest and punishment is another.]

The proclamation was a law within the meaning of the Pondoland Annexation Act, and within the definition contained in the Cape Interpretation Act of 1883, ss. 2, 3, 4.

[LORD WATSON referred to the last section of the latter Act.]

By the proviso to the 2nd section of the Pondoland Annexation Act, the Cape Parliament reserved to itself the right to judge of the validity of any legislative act done by the Governor. This proclamation has been laid before it and has not been "repealed, altered, or varied" by it. It was therefore "effectual" for its purpose, and there was no jurisdiction in the Cape Supreme Court to set it aside. Moreover, no English Habeas

(1) (1885) 10 App. Cas. 678.

Corpus Act has been introduced, nor is there any analogous local legislation. The rights to liberty possessed by the subject in that Colony are such as can be claimed by the interdictum de homine libero exhibendo of the Civil Law, which is not applicable to an act of State or an arrest by order of the Government, and is clearly defined in the Digest of Justinian, bk. 43, title 29, as applicable to the case of persons confined by private authority. And 28 & 29 Vict. c. 63, ss. 3 and 4, shew that it is no objection that the colonial law on this subject is repugnant to the law of England or inconsistent with any instructions given to the Governor.

[THE LORD CHANCELLOR. This was hardly an Act of State, but rather an Act of Attainder by virtue of a special Act of Parliament.]

Asquith, *Q.C.*, and *Bray* (*Beard* with them), for the respondent. The Governor had no power to pass such a law as purports to have been passed by the proclamation of June 11, 1895. Such a power cannot come from the royal prerogative. It must come, if at all, from the Cape Legislature. It is admitted that the legislature might pass an Act to deprive a man of his liberty, but that has not been done by the Pondoland Annexation Act, and it lies upon the appellant to shew in what way the power was conferred. [Reference was made to *Reg.* v. *Burah.* (1)]

Pondoland became part of Griqualand East for administrative purposes only, and the only laws which could be applied to it, according to the true construction of s. 2 of the Act of 1894, would be laws already in force in the Cape Colony. An arbitrary proclamation against an individual is not a law within the meaning of the Act. Besides, there was a regular criminal code and procedure already in force in Pondoland (Cape Act 24 of 1886). As to there being no Habeas Corpus Act in the Colony, if the Supreme Court had no jurisdiction to release the respondent, the Judicial Committee would, at any rate, have it.

[THE LORD CHANCELLOR. That point hardly arises. The Chief Justice has assumed that the jurisdiction exists.]

(1) (1878) 3 App. Cas. 889.

J. C. 1897 SPRIGG v. SIGCAU.

Cozens-Hardy, Q.C., in reply. By Act 5 of 1894, Pondoland was made part of Griqualand East, and became subject to all the laws of Griqualand East. The proviso to s. 2 of Act 5 of 1894, contemplates a power to make new laws, which are to be effectual unless repealed or altered by the legislature. By virtue of the proclamation of September 25, 1894, Act 38 of 1877 came into force in Pondoland, and that Act gave the Governor express power to make new laws without any limitation.

[LORD SHAND. The judgment of the Chief Justice goes to the length of denying the Governor's right to make any new law by proclamation.]

1897 *Feb.* 26.

The judgment of their Lordships was delivered by

LORD WATSON. The respondent Sigcau was at one time an independent native chief, exercising paramount authority within the district of country in South Africa known as Pondoland. In the beginning of the year 1894 he made a peaceful cession of his territory to the British Crown, and became one of Her Majesty's subjects. Thereafter, Her Majesty's representative in the Government of the Cape Colony appointed officers for the administration of the ceded territory and duly proclaimed certain laws to be in force within it. One of these laws was the Colonial Act No. 24 of 1886, which contains a complete criminal code. It specifies in detail numerous offences against public order, public tranquillity, and the administration of justice, and provides for their adequate punishment. By s. 112, any wilful attempt to obstruct the course of justice or the administration of the law is made punishable with death or with imprisonment for life. The 20th chapter of the Act provides a complete system of procedure for the arrest, trial, and condemnation of offenders, and confers criminal jurisdiction upon certain local courts; and by s. 268, power is reserved to the Attorney-General to remove any case for trial in the Supreme Court of the Cape Colony, if it shall appear to him that, by that course, substantial justice may be better attained.

On August 14, 1894, an Act of the Cape Legislature was assented to by the Governor of the Colony on behalf of the

Crown, which proceeds upon the preamble that it was the intention of Her Majesty to issue Her Royal Letters Patent to authorize the Governor, by proclamation under his hand and the public seal of the Colony, to declare that from and after a day to be therein mentioned the country known as Pondoland, comprising the territories of East and West Pondoland, should be annexed to and form part of the Colony, in case the Legislature of the Colony should have passed an Act providing that the said country should become a part of the Colony. Sect. 1 of the Act provides that from and after such day as the Governor shall, pursuant to the powers in that behalf contained in any Royal Letters Patent which may be issued for that purpose, declare by proclamation, the country mentioned in the preamble, and with the name of Pondoland, shall be annexed to and form part of the Cape Colony.

Sect. 2, which it is necessary to construe for the purposes of this appeal, enacts that, from and after the date of such proclamation, the territory of East Pondoland shall become part of that portion of the Colony known as Griqualand East, and the territory of West Pondoland part of that portion of the Colony known as Tembuland; "and the said territories shall be subject to such laws, statutes, and ordinances as have already been proclaimed by the High Commissioner, and such as, after annexation to the Colony, the Governor shall from time to time by proclamation declare to be in force in such territories: Provided always that all such laws made under or by virtue of this Act shall be laid before both Houses of Parliament within fourteen days after the beginning of the Session of Parliament next after the proclamation thereof as aforesaid, and shall be effectual, unless in so far as the same shall be repealed, altered, or varied by Act of Parliament." The contemplated annexation was thereafter duly carried into effect, and the provisions of the Act became operative.

On June 11, 1895, Sir Hercules Robinson (now Lord Rosmead), as Governor and Commander-in-Chief of the Cape Colony, and as Her Majesty's High Commissioner, &c., &c., issued the proclamation which has given rise to these proceedings. It commences with the narrative that it had been

J. C. 1897 SPRIGG v. SIGCAU.

reported that the respondent Sigcau, the chief of the tribes residing in the territory of East Pondoland, had refused to permit a duly authorized officer of the Government to do his lawful duty; that it appeared that the presence of the said Sigcau in East Pondoland was dangerous to public safety and good order in that country, and was likely to lead to the disturbance of the public peace; and that it appeared expedient to make provision for the arrest of the said Sigcau, and for his detention in some suitable place either within or beyond the boundaries of Pondoland, but within the territories of the Transkei, Tembuland, and Griqualand East. The operative part of the proclamation is in these terms:—

"Now therefore, under and in virtue of the powers vested in me by law, more especially in the Acts annexing the territories of the Transkei, Tembuland, Griqualand East and Pondoland, I, the Governor aforesaid, do proclaim declare and make known that the said Sigcau has by his acts in disregard and defiance of the law rendered himself liable to arrest; and I do hereby authorize and command the chief magistrate of Griqualand East to cause the said Sigcau, on failure to surrender himself, to be forthwith arrested; and do ratify and confirm all acts done or authorized, or to be done or authorized by the said chief magistrate, or done with his approval by any officer of the law proper for the execution of criminal warrants, any member of the force of Cape Mounted Riflemen, any constable, police officer or gaoler, in or about the arrest of the said Sigcau, or with a view to securing his person, or in encountering, opposing or suppressing any resistance by or on behalf of the said Sigcau, and his subsequent arrest and custody under this proclamation. And I do authorize and empower the said chief magistrate, or any other person acting in accordance with my instructions, to detain the said Sigcau in such place in the aforesaid territories as may be by me from time to time determined, during such time and under such conditions as to safe custody as may appear to me to be necessary and expedient for the preservation of public order and safety: Provided that it shall be lawful, after such inquiry as may be instituted by my direction, and in case it may be possible to do so without

jeopardy to the interests of public peace and order, to release the said Sigcau from close custody in detention, and to appoint a place within the said territories for the residence of the said Sigcau, with the pecuniary allowances to which he is entitled, but under such terms and conditions as may be determined by further proclamation."

After the terms of the foregoing proclamation came to his knowledge, Sigcau went to Kokstad, and on June 18, 1895, reported himself to the chief magistrate, by whom he was at once placed in prison and kept in close confinement. No warrant was issued for his arrest, other than the proclamation; beyond the vague allegations contained in that document, no charge was preferred against him; and he was not brought before any tribunal, in order to his being dealt with according to the ordinary course of law.

On July 29, 1895, a petition was presented on behalf of the respondent to His Honour the Chief Justice and others the judges of the Supreme Court of the Cape Colony, praying them to "order his immediate liberation and discharge; or otherwise that your Lordships will call upon the magistrate of Kokstad aforesaid under whose custody your petitioner understands he is, to produce your petitioner before your Lordships, and to shew cause why he should not be discharged; or may make such other order in the premises as to your Lordships may seem meet." The petition was opposed by the Right Honourable Cecil John Rhodes, at that time Prime Minister and Secretary for Native Affairs of the Colony of the Cape of Good Hope, and by the Honourable William Philip Schreiner, Q.C., the Attorney-General of the Colony. The case was heard before the Supreme Court, when it was maintained by the Attorney-General that the proclamation of June 11 was a special law, which the Governor had full power to enact under the provisions of s. 2 of the Pondoland Annexation Act, 1894, which have already been cited at length, and that the Court had therefore no jurisdiction to interfere with its execution. De Villiers C.J. delivered the opinion of the Court, who ordered "that the said applicant be forthwith discharged from custody."

Mr. Rhodes and Mr. Attorney-General Schreiner applied to

J. C. 1897 SPRIGG v. SIGCAU.

the Supreme Court for leave to appeal to Her Majesty in Council, which was refused, upon the ground that such leave can only be granted by them in civil suits or actions in which the sum or matter at issue exceeds 500*l*. On December 12, 1895, Her Majesty, upon the advice of this Board, granted leave to appeal, subject to the condition that the appellant should in any event pay the costs as between solicitor and client incurred by the respondent in defending the appeal. Mr. Rhodes and Mr. Schreiner having ceased to hold office in the Cape Government, the Supreme Court of the Colony, on April 21, 1896, substituted the new Premier of the Colony, Sir John Gordon Sprigg, as appellant, in room of his predecessor, omitting the new Attorney-General, the Honourable Sir Thomas Upington, who had previously been a member of the Supreme Court and was a party to the judgment under appeal.

The proclamation in question is described in the appellant's case as an act of State which is beyond the cognizance of any judicial tribunal. Whatever may have been meant by that expression, the character of the document is, on the face of it, abundantly clear. It is an edict, dealing with matters administrative, judicial, legislative and executive, in terms which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated. If the Governor and High Commissioner of the Cape Colony could be shewn to have occupied one or other of these positions, a Court of law would be compelled, however unwillingly, to respect his proclamation. If he did not, then his dictatorial edict was simply an invasion of the individual rights and liberty of a British subject. It set aside the established law of Pondoland with respect to arrest, trial, conviction and punishment; and condemned the respondent Sigcau, untried and unheard, to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the framer of the edict.

It was satisfactory to find that the appellant's counsel did not, in the argument before this Board, venture to trace the power of the Governor to enact such a proclamation to any

authority directly derived from Her Majesty; because autocratic legislation of that kind in a Colony having a settled system of criminal law and criminal tribunals would be little calculated to enhance the repute of British justice. Various Acts of the Cape Parliament annexing different tracts of country to the Colony were referred to in the course of their argument; but none of these had a direct bearing upon the question raised in this appeal, save the Pondoland Annexation Act, 1894, which is the only statute professing to confer legislative power upon the Governor within the territory of Pondoland. Whether his Excellency had, or had not, power to enact the proclamation of June 11, 1895, is therefore a question depending, in the first instance, upon the due construction of the provisions of the Act of 1894.

The general scheme of all these Acts appears to have been to delay the enactment of many salutary laws elsewhere prevailing throughout the Colony until the native inhabitants of the newly annexed territories had so far advanced in civilization and in social progress as to make the gradual introduction of these laws advisable. Thus the new laws which were in future to be made by the Governor under the provisions of the Tembuland Annexation Act were to be (s. 2), "new laws applicable to the said territories," an expression which obviously refers to general laws applying to all inhabitants of the territory, whether natives or not, and does not seem to contemplate or include special legislation directed against an individual inhabitant, and that in derogation of the rights conferred upon him by the general law of the Colony.

The legislative authority delegated to the Governor by the Pondoland Annexation Act is very cautiously expressed, and is very limited in its scope. There is not a word in the Act to suggest that it was intended to make the Governor a dictator, or even to clothe him with the full legislative powers of the Cape Parliament. His only authority, after the date of the Act, is to add to the laws, statutes and ordinances which had already been proclaimed and were in force at its date, such laws, statutes and ordinances as he "shall from time to time by proclamation declare to be in force in such territories." In the opinion of their Lordships, these words do not import any

J. C. 1897 SPRIGG v. SIGCAU.

power in the Governor to make "new laws," in the widest sense of that term; they do no more than authorize him to transplant to the new territories, and enact there, laws, statutes and ordinances which already exist, and are operative in other parts of the Colony. It was argued for the appellant that the expression "all such laws made," occurring in the proviso, indicates authority to make new laws which are not elsewhere in force; but these words cannot control the plain meaning of the enactment upon which they are a proviso; and, besides, that enactment is left to explain the meaning of the proviso by the reference back which is implied in the word "such."

Their Lordships think it sufficient for the disposal of this appeal to point out that the proclamation of which the respondent Sigcau complains exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes and ordinances which he is authorized to proclaim; and it in substance repeals the whole provisions of the existing law, with respect to criminal proceedings, in so far as the respondent is concerned. Upon these grounds, their Lordships are of opinion that the issue of the proclamation was an illegal and unwarrantable act, and that the Supreme Court of the Colony did right in refusing to give effect to it, and in liberating the respondent.

On the assumption that the Pondoland Annexation Act did, as the appellant maintains, confer upon the Governor either expressly, or by plain and reasonable implication, the arbitrary powers which would be required in order to justify his proclamation, a variety of important questions would arise; but upon these, in the view of the case which they have taken, their Lordships find it unnecessary to express any opinion.

Their Lordships will therefore humbly advise Her Majesty to affirm the order of the Supreme Court appealed from, and to dismiss the appeal. The appellant must pay to the respondent his costs of the appeal as between solicitor and client.

Solicitors for appellant: *Wilson, Bristows & Carpmael.*
Solicitors for respondent: *Thomas Beard & Sons.*

[PRIVY COUNCIL.]

J.C.*
1896
July 15;
Dec. 16.

In re HOPKINSON'S PATENT.

Prolongation—Petition by Assignee of Inventor.

Although the effect of the Act of 1883 (46 & 47 Vict. c. 57) is to confirm an assignee's right to petition for prolongation of his patent, he cannot succeed without shewing that the original inventor has been inadequately remunerated.

THIS was a petition by John Hopkinson and the Westinghouse Electric Company, Limited, for an extension for fourteen years of letters patent, dated July 27, 1882, for an invention of "improvements in distributing and measuring electricity, and in apparatus to be employed for those purposes," under the circumstances stated in their Lordships' judgment.

Moulton, Q.C., Wallace, Q.C., and *Walter*, for petitioners.

Sir R. Webster, A.-G., and *Sutton*, for the Crown.

Cripps, Q.C., and *Graham*, for corporations of Edinburgh, Aberdeen, and Belfast.

Bousfield, Q.C., and *Jenkins*, for other corporations.

Terrell, Q.C., and *Pritchard*, for the Liverpool Electric Company, Limited.

Ashton and *Neill*, for other opponents.

Sir R. Webster, A.-G., took the preliminary objection that it appeared on the face of the petition that Dr. Hopkinson, the original inventor and patentee, had received 19,400*l.* at least, and that the patent had been sold outright to a company who purchased it as a commercial speculation. He referred to *Bower-Barff Patent* (1) as shewing that the assignee of a patent under the circumstances stated below could not obtain a prolongation.

Moulton, Q.C., contended that it had never been ruled that an

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

(1) [1895] A. C. 675.

J. C. 1896 *In re* HOPKINSON'S PATENT.

assignee who had dealt liberally with the inventor is disentitled to a renewal. See *Morgan's Patent.* (1) Reference was made to s. 25 of 46 & 47 Vict. c. 57, which used the word "patentee" in preference to that of "original inventor," and requires all the circumstances to be considered. Here the assignee is now the patentee: *Bodmer's Patent* (2); *Claridge's Patent* (3); *Napier's Case* (4); *Hardy's Patent.* (5)

Sir R. Webster, A.-G., replied, citing *Norton's Patent.* (6)

1896 Dec. 16.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The petitioners in this case are Dr. John Hopkinson, the inventor and patentee, and the Westinghouse Electric Company, who are assignees of the patent. Before the case was opened the Attorney-General drew the attention of their Lordships to some statements in the petition which, as he contended, disclose a grave objection to the extension prayed for.

It appears that in the year 1889 the petitioning company was formed for the purpose of acquiring the beneficial interest in the patent, which was then vested in an American company under an agreement with Hopkinson; that since July 20, 1889, the petitioning company have worked the invention for their own benefit; and that in 1891 Hopkinson formally declared himself to be a trustee for them. It further appears that prior to 1889 Hopkinson made the trifling profit of 350*l.* from this patent and from one taken out by him in Germany; but that subsequently to the agreements by which the company acquired the beneficial interest he has received the sum of 19,400*l.* as the price of the English and German patents. The only substantial petitioners, therefore, are the company. Hopkinson has no interest, and it is not alleged that the sum of nearly 20,000*l.* is less than an adequate remuneration to him.

The company state that their expenditure in acquiring the patents, and in defending them against encroachment, has

(1) (1843) Webst. Pat. Ca. 737.
(2) (1849) 6 Moo. P. C. 468; (1853) 8 Moo. P. C. 282.
(3) (1851) 7 Moo. P. C. 394.
(4) (1861) 13 Moo. P. C. 543.
(5) (1849) 6 Moo. P. C. 441.
(6) (1863) 1 Moo. P. C. (N.S.) 339.

largely exceeded their receipts; and they contend that they stand in the position of persons who take up and assist inventors in developing useful inventions, and that this merit has been recognised as entitling assignees of patents to a prolongation of the term.

To support this contention Mr. Moulton referred to the judgment of this Board delivered by Lord Brougham in the year 1843 in the case of *Morgan's Patent.* (1) Lord Brougham there points out that a patentee is benefited by the chance of a sale, and therefore in his interest consideration has been given to the claims of assignees. That shews the reason why assignees have been allowed to come for prolongation, and it shews no more. When they do come, all the circumstances, including the inventor's remuneration, must be considered. In the particular case cited prolongation was refused.

The claims of assignees were the subject of consideration in the case of *Claridge's Patent* (2), which was decided in the year 1851. The judgment of the Board was delivered by Sir J. Jervis. He pointed out that assignees, though their right to petition was recognised, were not to be treated with the same indulgence as patentees. In that case Claridge, the inventor, had received ample satisfaction. The company, his assignees, had entered into a commercial speculation, and their loss was not a ground for prolongation of the patent.

The same subject was discussed more fully in the year 1863, in the case of *Norton's Patent* (3), when Lord Romilly delivered the judgment of this Board. He quotes the language of Lord Langdale in a previous petition by the Electric Telegraph Company. After saying that it would not be right to take into consideration the commercial affairs of the company, Lord Langdale continues thus:—

"They buy this patent right; they buy it for a commercial purpose, not at all with the view of encouraging the inventors, or of rewarding the inventors, though when they are sinking their own capital in this particular mode, they do incidentally give a profit to the inventors. It is not the same case as some

(1) Webst. Pat. Ca. 737. (2) 7 Moo. P. C. 394.
(3) 1 Moo. P. C. (N.S.) 339.

J. C. 1896 *In re* HOPKINSON'S PATENT.

cases which have arisen, where the inventor, being himself struggling with difficulty for the want of capital, is obliged to obtain the assistance of persons who have capital, giving them a share of the profits, which may be done in a great variety of ways and under many different circumstances; but these parties, with a knowledge of the value of the invention, and its capability of being reduced to practical use to any extent to which capital might be employed upon it, think fit to engage that capital in carrying on a trade by the use of this particular invention."

Lord Romilly then adds: "The ground that the merits of the inventor ought to be properly rewarded in dealing with the merits of an invention which has proved useful and beneficial to the public, does not exist in the case of an assignee unless the assignee be a person who has assisted the patentee with funds to enable him to protect and bring out his invention, and thus enabled him to bring it into use, none of which grounds exist in the present case."

The Act of 1883 has, by defining the word "patentee," confirmed the assignee's right to petition for prolongation; and it empowers Her Majesty to grant it if this Board reports that "the patentee" has been inadequately remunerated. But their Lordships do not consider that by this definition the Legislature has placed assignees on the same favourable footing as inventors with regard to prolongation, or has altered the principles which guided this Board in the cases above cited. It cannot be seriously contended that an assignee who may have purchased a patent at a late period of its life can, if he has lost money, come here alleging that he is by statute a patentee who has been inadequately remunerated, and ask for a report to that effect.

In the case of the *Bower-Barff Patent* (1) the principles of the prior cases were applied by this Board. In that case, as in the case now before their Lordships, the original inventors had received substantial remuneration, and the assignees had suffered loss. In delivering the judgment of the Board, Lord Watson pointed out that the inventors had no practical interest

(1) [1895] A. C. 675.

in the question, and were in the same position as if they were dead, because they had no longer an interest to ask for a prolongation on their own account, seeing that they had been sufficiently remunerated at the expense of the public.

Their Lordships consider that they would be departing both from authority and from sound principle if they were to hold that this company occupies the position of an inventor who has been inadequately remunerated. The company entered on a purely commercial speculation, which unluckily for them has up to the present time proved unremunerative. They did not assist to perfect or bring out the invention. They purchased it, or at least the beneficial interest, out and out, from a prior assignee of the inventor, who has in one way or another been well paid, and has now no claim or interest to ask for an extension. It is therefore impossible for their Lordships to make such a report as under s. 25 of the Act is the necessary condition of extension.

The petitioners must pay the costs. There are as many as seven sets of opponents, and in this case there ought not to be more than one set of costs allowed. The matter stood over to give the parties an opportunity of agreeing as to the amount. It was intimated that in case of non-agreement their Lordships would themselves name a sum, as has sometimes been done. As no agreement has been come to, the sum they name is 400*l.*

Solicitors for petitioners: *Faithfull & Owen.*

Solicitor for the Crown: *The Treasury.*

Solicitors for opponents: *Drake, Son & Parton; Deacon, Gibson & Medcalf; Field, Roscoe & Co.; W. G. Greig; Harrison & Powell; W. F. Wakeford; Sharpe, Parker, Pritchards & Barham.*

[PRIVY COUNCIL.]

J. C.* 1897 *Feb.* 10, 11, 12; *March* 6.

GREY AND ANOTHER . . . . . PLAINTIFFS;

AND

MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA } DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Law of Canada—Dominion Railway—Section capable of Sale—Jurisdiction of provincial Court—Part of Section outside Jurisdiction of Court—Construction of Mortgage—Revenues—Practice—Issues not raised in Courts below.

In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues subject to working expenses, for a sale of the division and for a receiver and other relief:—

Held, (1.) that this division of 180 miles is by the law of Canada applicable to the railway a section capable of sale in its entirety, but that the provincial Court had no power to order a sale, part of the section being within and part without its jurisdiction; (2.) that so long as the railway was worked as a whole the revenues of the division are subject along with other revenues to the working expenses of the whole line, and that the receiver was only entitled to the net earnings of the division so ascertained.

Their Lordships declined to hear argument as to the validity of the mortgage or of the power of sale, or of the mortgagees' right of entry, the pleadings and evidence not raising those issues, and the Courts below not having adjudicated thereon.

APPEAL from a decree of the full Court of the Queen's Bench in Equity for Manitoba (Feb. 10, 1896) varying a decree of Killam J. (April 17, 1895).

The respondents are a railway company originally incorporated in 1880 by an Act of the Province of Manitoba (43 Vict. c. 35) as "The Westbourne and North Western Railway Company." This Act was amended in 1881 by an Act of the province (44 Vict. c. 41) whereby, inter alia, the name of the

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY.

company was changed to "The Portage Westbourne and North Western Railway Company."

Under these Acts the railway company had power to construct and operate a line of railway and electric telegraph from Portage la Prairie in the Province of Manitoba to the northern and western boundary of the province, and to build and operate specified branch lines within the Province of Manitoba.

In the year 1882, by an Act of the Parliament of Canada (45 Vict. c. 80), the respondents' railway was declared to be a work for the general advantage of Canada, becoming thereby, by sub-s. 10 of s. 92 of the British North America Act, 1867, a Dominion railway, subject to the jurisdiction of the Dominion Parliament. This Act was amended in the following year (1883) by 46 Vict. c. 68, Canada, and the name of the company was changed to "The Manitoba and North Western Railway Company of Canada"; and by s. 5 the Act limited and defined the borrowing powers of the railway company.

The facts and proceedings in the suit are sufficiently stated in the judgment of their Lordships.

The three questions decided in the appeal are as follows:—

(i.) Whether the appellants as mortgagees are entitled to have a sale of the whole of the first division of the respondent company's railway and telegraph.

(ii.) Whether if the appellants are not entitled to have a sale of the whole of the first division they are entitled to have a sale of that portion of the first division (being about 170½ miles) which is wholly situated within the Province of Manitoba.

(iii.) Whether the mortgage of the first division of the respondent company's railway and telegraph to the appellants is subject to the payment in priority of the working expenses of the entire line of railway worked and owned by the respondents (inclusive of the first division) and of all rates, taxes, assessments and other Government charges charged thereon, or only of the working expenses of the said first division and the rates, taxes, assessments and other Government charges charged thereon.

J. C.
1897
GREY
v.
MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

The decree of Killam J. was :—

(*a*.) That the receiver of the revenue, tolls and profits of the first division should be continued.

(*b*.) That all necessary inquiries should be made, accounts taken, costs taxed, and proceedings had for redemption or sale, and that for these purposes the cause should be referred to the master.

(*c*.) That the company forthwith after the making of the master's report should pay to the plaintiffs what might be found due to them for principal money, interest and costs.

The full Court were of opinion that the 180 miles, or first division of the respondents' railway, was a section within the meaning of s. 278 of the Dominion Railway Act, 1888, but that the Court had no jurisdiction to decree a sale of that portion of the first division of the respondent company's railway situated outside the Province of Manitoba, and that the appellants were not entitled to have a sale decreed of all or any part of the said first division, in so far as the same consisted of real property. They were also of opinion that the mortgage to the appellants of the said first division was subject to the payment in priority to such mortgage of the working expenses of the entire railway ; but they did not declare the rights of any parties in respect of such priorities after any sale of the said first division. In other respects they affirmed the judgment of Killam J.

Blake, Q.C., and *Ewart, Q.C.* (*Sir E. Clarke, Q.C.*, and *A. E. Balfour* with them), for the appellants, contended that a sale should have been directed. The first division comprising 180 miles is capable of being sold by the Court in Manitoba at the instances of the mortgagees. It is admittedly a section within the meaning of s. 278 of the Dominion of Canada Railway Act (51 Vict. c. 9) : see *Redfield* v. *Corporation of Wickham*. (1) Besides, the respondents adduced no evidence to shew that a sale of this division would be contrary to the law in force in the adjacent North West Territory. In the absence of such evidence the Court in Manitoba should have decreed a sale thereof, relying on the Court in the North West Territory to

(1) (1888) 13 App. Cas. 467.

carry out and give effect to such a decree as a matter of comity if and so far as it might be necessary to do so. In the alternative, if it was incompetent for the Court in Manitoba to decree a sale of the whole of the division, still the 170½ miles or thereabouts of the same which are wholly situated within the province are a "section" of the railway capable of being sold under 51 Vict. c. 9. Besides, it was competent to the Court as a Court of Equity to decree a sale of the whole division in accordance with the terms of the trust deed of April 16, 1886 (the mortgage deed), notwithstanding the fact that 9½ miles of such division are situated outside the Province of Manitoba. Such deed evidenced a contract between the appellants and the respondent company, both of whom are subject to the jurisdiction of the Court. By acting on the persons or corporations within its jurisdiction the Court could enforce a sale. There might be a decree in personam if not in rem, the Court having jurisdiction either to enforce a trust or to give relief to mortgagees. Reference was made to Palmer's Company Precedents (6th ed.), Forms 544, 545, 546, at pp. 880, 881 and 882, as precedents for directing a sale of company's real property situate abroad in favour of debenture-holders: see Dicey's Conflict of Laws, p. 217, and a judgment of Lord Brougham in *Lord Portarlington* v. *Soulby* (1), and *Ewing* v. *Orr Ewing* (2), there cited. In many respects it is wrong to talk of the Courts of Manitoba and the North West Territories being foreign to each other. They have a common Court of Appeal. Reference was made to *Cooper* v. *Cooper* (3); *Companhia de Moçambique* v. *British South Africa Co.* (4); *Norris* v. *Chambres* (5); *Harrison* v. *Harrison.* (6)

Upon the true construction of the trust or mortgage deed of April 16, 1886, and the special Acts of 1882, 1883, and 1886 relating to the respondent company, particularly of s. 4 of the Act of 1886, the mortgage to the appellants of this division of the railway is only subject to the payment in priority of the

(1) (1834) 3 My. & K. 104.
(2) (1883) 9 App. Cas. 34, 40.
(3) (1888) 13 App. Cas. 88.
(4) [1893] A. C. 602, 626, 631.
(5) (1861) 29 Beav. 246; 3 D. F. & J. 583.
(6) (1872) L. R. 8 Ch. 346.

J. C. 1897 GREY v. MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

working expenses of such division, and of all taxes, rates, assessments, and other Government charges thereon. This division can and ought to be sold free from any liability to maintain the other portion of the respondents' railway. Any other construction would render this division or section of railway practically unsaleable, for it would be burdened with the upkeep of the other portions of the railway, and of any extensions of the same which the respondents are empowered to make.

Robinson, Q.C., and *Swinfen Eady, Q.C.* (*Phippen* with them), for the respondents, contended that the decree of the full Court was right so far as it refused a sale of the first division, and declared that the appellants' mortgage is subject to the working expenses of the entire railway. The contention was, not that the section was burdened exclusively with the entire working expenses of the whole road, but that net revenue of the whole line should be ascertained by deducting the whole working expenses from the whole gross revenue, and then that its own proportion of net revenue should be appropriated to the first division. It would be a question of complicated account; but the net revenue so attributable to the section is all that the appellants are entitled to. As regards sale, the Court below was right in saying that they could not decree it, part of the section being outside their jurisdiction. Such a decree would necessarily be a decree in rem; a decree which shall act directly on foreign land and sell it. The North West Territories and Manitoba are just as separate as the two provinces of Ontario and Quebec, in respect of legislature, judiciary and executive. Beyond the authorities given in the judgment under appeal, see *In re Hawthorne.* (1) With regard to the precedents cited on the other side from Palmer, the circumstances under which such decrees were made do not appear. The decree sought in this case is not in personam: it would operate simply in rem. Personal relief is not sought in this suit, nor is any declaration sought as to the validity of the mortgage, power of sale, or power of entry; nor was any evidence or decision given on those points. What was asked for was a judicial sale. *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) shews that

(1) (1883) 23 Ch. D. 743. (2) (1867) L. R. 2 Ch. 201.

on principle or considerations of public policy apart from statute a mortgagee cannot enforce a sale of a railway undertaking; and the statutes applicable to this railway do not confer any right to disintegrate it by selling the first division. In any event, as the Manitoba Court has no power to sell a portion of the section, the remainder thereof is not an integer, capable of being sold.

Blake, Q.C., replied.

1897. March 6. The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellants, who were plaintiffs below, contend that they are entitled to a decree for sale of a section of the defendants' line of railway and telegraph. This has been refused by the Court of Queen's Bench in Manitoba, whose decree is under appeal; and the questions before this board are: first, whether the Court was right in such refusal; and, secondly, if it was, whether the plaintiffs are or are not entitled to other relief in this suit.

The line in question was commenced under powers conferred by the Manitoba Legislature within that province. In the year 1882 it became a Dominion railway subject to the exclusive jurisdiction of the Dominion Parliament; and Acts of Parliament have been passed for the extension of the line into the North West Territory beyond the limits of Manitoba. In the years 1882, 1883, and 1885 the company obtained powers to issue mortgage bonds upon the whole or part of their line, not exceeding 20,000*l.* per mile according to the state of their works. In pursuance of those powers the company issued bonds which in the year 1885 were cancelled and were replaced by fresh issues now in existence.

The instrument on which the plaintiffs found their claim is a mortgage dated April 16, 1886. At that time the company had power under an Act of 1883 to secure their bonds by mortgage of the whole or any part of their property, assets, and revenues, subject to the condition that their revenue should be pledged in the first instance to the payment of the working expenses of the railway. They had then constructed 130 miles,

J. C. 1897 GREY v. MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

and had placed fifty more under contract. That length of 180 miles is called the first division or portion of the railway, and has been at work for some years. The bonds were a series of 5400, each of the nominal value of 100*l.*; equal to a charge of 3000*l.* per mile of the first division. They bear on their face that they are secured by the mortgage in question.

By that mortgage the company grant to the plaintiffs: first, the first division of the line, with all rights and properties used for the construction, maintenance, and operation of that division; secondly, the plant specified in a schedule, and all other plant then or thereafter acquired for the purpose of constructing or working the first division; thirdly, the revenues of the first division, subject to (among other things) the working expenses "of the said railway and telegraph"; and, fourthly, incorporeal rights connected with the first division. A number of special provisions are contained in nineteen articles, of which only three need be referred to now.

By art. 2, if default is made in payment of interest for three months, power is given to the mortgagees (called the trustees) to enter upon the mortgaged property to operate and to conduct the business of the first division. After deducting the expenses of operating that division, and other deductions there specified, the trustees are to apply the money in payment of the bonds.

By art. 3, if the default continues for twelve months, power is given to the trustees, either with or without entry, to sell the mortgaged property, and after deducting the expenses incurred by the trustees in operating and maintaining the "said railway and premises," and other deductions, to apply the residue in payment of the bonds.

By art. 18 the company covenant to pay the interest of the bonds, and for that purpose to apply the net earnings and income derived from the mortgaged division.

By an Act of Parliament passed on June 2, 1886, it is enacted that as soon as the prior bonds have been surrendered and cancelled, the bonds secured by the mortgage of April 16 shall be ratified and confirmed, and shall be the first lien and charge on the first division of the railway as provided by the said mortgage deed.

By another Act of Parliament passed in the year 1893 it is enacted that securities issued by the company, among which the bonds and mortgage are specified as affecting the first division, shall remain the first preferential claims and charges upon the respective portions of the company's undertaking or property affected or charged as security for payment in each case, and according to the tenor and effect of any by-law, or of any deed of mortgage, conveyance, or assurance, in each case.

The company have not been able to meet their obligations, and in June, 1893, a Mr. Allan and others, judgment creditors of the company, filed a bill praying for the appointment of a receiver. On June 8, 1893, Allan was appointed receiver of the undertaking and assets of the company until the hearing, and he was ordered to provide for the working expenses of the railway and other outgoings and repairs. That order was substantially continued at the hearing of the cause on July 13, 1893.

On July 3, 1894, the plaintiffs filed the bill in the present case, praying as follows:—

"1. That the defendants may be ordered to discover what personal property is now embraced in or included in the security referred to in this bill namely the indenture of sixteenth April 1886.

"2. That all the property described in and included under the said indenture may be sold under the direction of this Honourable Court and that the plaintiffs may have liberty to bid at such sale.

"3. That a receiver may be appointed of the revenues tolls and profits of the first division of the said railway and that the same may be applied in payment of the amount secured by the bonds hereinbefore referred to.

"4. That the plaintiffs may have such further and other relief as to your Lordships shall seem meet and as shall not interfere with the possession of the receiver in the suit hereinbefore referred to of *Allan* v. *Manitoba and North Western Ry. Co.*"

It seems that by some interlocutory order a receiver was appointed.

J. C.
1897
GREY
v.
MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

At the hearing before Killam J. it was shewn that of the 180 miles of the first division 9½ miles lay in the North West Territory; and the questions were whether a sale should be ordered either of the whole division or so much thereof as lies within the limits of Manitoba, and whether there should be a receiver of the revenues of the first division, and if so upon what terms. That learned judge held that nothing less than the entirety of the division was saleable; and the soundness of that opinion, which was shared by the Court of Appeal, has hardly been disputed at this bar. He further held that, though the Manitoba Court could not conduct a sale outside the province, it could properly, especially as the plaintiffs are trustees, take notice that they had a valid power of sale extending to the whole first division, and give orders for their protection and assistance. He felt no difficulty about continuing the receiver.

By his decree dated April 17, 1895, he continued the receiver, and ordered him to apply the revenues received in accordance with the terms of the mortgage except so far as it directs payment of moneys to the plaintiffs, which moneys were to be paid into court. He directed an inquiry as to the personal property included in the mortgage, and ordered that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had, for redemption or sale. He made the usual mortgage decree for payment and redemption; and then went on to give directions "in the event of a sale." He declined for the present to decide whether the company was entitled to charge the working expenses of the line against the revenues of the first division.

The wording of this decree is very peculiar. Apparently it is intended to avoid the difficulty arising from part of the land being beyond the jurisdiction of the Court by not ordering a sale in terms, but leaving it to take effect under the power. It has, however, been treated in the subsequent stages of the litigation as being substantially a decree for a judicial sale; and it is not easy to treat it otherwise. The company appealed from it on this ground. They also appealed on the ground that a receiver ought not to be appointed, or if appointed,

should at least receive nothing till after payment of the working expenses of the whole line.

The Court of Appeal held that the first division is a section of the railway which by the law of Canada is capable of sale; but that it must be sold in its entirety, and that the Manitoba Court could not do that for want of jurisdiction in the North West Territory. They further held that it was right to continue the receiver of the revenues of the division, but that he must take subject to the working expenses of the entire line.

By their decree dated February 10, 1896, they reversed the decree below so far as it directs a sale of any portion of the defendants' property other than the personal property. They then made an order respecting the charge of working expenses, the terms of which are open to some exception as being capable of an extension wider than was meant. But they need not be minutely discussed now, because the company do not ask anything more, or allow that the decree gives them anything more, than the right to deduct the working expenses of the railway from its receipts before handing anything over to the receiver of the revenues of the division.

To dispose of this point at once, their Lordships are of opinion that as long as the line is worked as a whole the terms of the mortgage make it clear that the revenues of the first division are subject, along with the other revenues, to the working expenses of the whole line. Different considerations would arise if the mortgagees were to enter and operate under art. 2 of the mortgage, or to sell under art. 3—parts of the deed which did not enter into discussion before the Court of Appeal. But the appointment of a receiver of the revenues does not disturb the entirety of the management, and it leaves the entire revenue subject to the entire charge. Therefore with an alteration, which perhaps is only verbal, for the purpose of avoiding the construction objected to by the plaintiffs and disclaimed by the company, their Lordships assent to the order relating to the receiver.

As regards the question of sale, the decisions, both English and Transatlantic, which bear on the jurisdiction of Courts of

J. C.
1897
GREY
v.
MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

Justice to deal with foreign land, have been very carefully discussed in the Courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the Court. It is impossible to do that; the decree of the Court below does not do it directly, and it has been hardly more than suggested at the bar that there is any principle or authority to justify it. The two reasons urged for supporting the decree of the First Court are of a different nature.

One is that the plaintiffs are trustees and are entitled to the aid of the Court in administering their trusts. But this is not a suit for the administration of the trusts; it certainly could not be made so unless the beneficiaries were represented separately from the trustees. The plaintiffs sue as mortgagees to enforce their mortgage; and the fact that they are trustees cannot give them any larger rights against their mortgagors, or any larger jurisdiction to the Court, than if they were sole owners.

The other reason is that, inasmuch as the company is subject to Manitoba jurisdiction, it may be ordered to effect that sale which the Court cannot effect. But the company have not contracted to sell, nor have they the power to do so; nor did the bill or the decree of the First Court contemplate such a thing. The company, purporting to act in pursuance of statutory powers, have granted a mortgage containing a power of sale for the security of their creditors, and that mortgage has been recognised by statute. How far each portion of the mortgage is actually supported by statute, appears to be a question still in dispute; for Mr. Robinson on behalf of the company disputes the validity of the power of sale which they purported to confer; and as their Lordships were, for the reason to be presently stated, unwilling to hear his argument, they decide nothing about it. Supposing it to bind the company, it is quite a different thing from an undertaking by them to effect the sale themselves.

The result is that their Lordships concur with the view taken by the Court of Appeal on the question of sale. But then it is

contended that if the particular form of relief asked for by the bill cannot be granted, it is still open to the Court to grant substantial relief by way of affirming and construing the deed of mortgage, and so enabling the mortgagees to resort to their remedies in an effectual way. The company, it is said, resist an entry. They are now denying that there is any power to sell. They raise questions with reference to working expenses which are calculated to damage the chances of a sale. Let us at all events have such questions as these cleared up by declarations of the Court before we attempt to enter or to carry our property into the market.

In the course that the litigation has taken the Courts below have not dealt with these questions; but it may be assumed for the present purpose that under proper circumstances a suit might be framed and sustained for the now suggested relief. The respondents make the preliminary objection that this is not such a suit, and that it can only be converted into such a suit by amendments, which ought not now to be allowed. To determine this matter it is necessary to examine with some care the course of proceedings in the lower Courts.

It has been mentioned that in the year 1892 Mr. Allan was appointed to be receiver of the undertaking, assets, and property of the company. The consequence was that the plaintiffs could not take steps to enforce their mortgage except at the peril of committing a contempt of Court. In November, 1893, they presented a petition for leave to take proceedings. In that petition they stated the non-payment of interest, and that they had demanded possession of the first division, which the company had refused. They prayed as follows:—

"1. That leave may be granted to them to take such proceedings in this Honourable Court as they may be advised for enforcing their rights to enter upon possession of the said first division or 180 miles of railway and the other property conveyed to them under the said Indenture and to obtain possession thereof.

"2. That leave may be granted to your petitioners to take such proceeding in this Honourable Court as they may be advised for the appointment of a manager and receiver or for

J. C. 1897 GREY v. MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

such other redress as they may be advised and also for a foreclosure of the mortgaged premises.

"3. That leave may be granted to your petitioners to take such proceedings in this Honourable Court as they may be advised to enforce the execution by the defendant company of a deed of further assurance of the said fifty miles to the said trustees upon the trusts mentioned in the said Indenture.

"4. And that leave may be given to them to take such other proceedings as they may be advised for enforcing their rights in the premises.

"5. And that the reasonable costs of your petitioners incurred on this petition may be allowed and paid to them."

The record does not shew the whole of the proceedings on that petition; but the ultimate order made by the Appellate Court was, so far as material, as follows:—

"2. This Court doth further order that the petitioners be at liberty to file a bill in this Court praying that the premises comprised in the security referred to in the said petition being the mortgage bearing date the 16th day of April A.D. 1886 may be sold and that a receiver of the revenues tolls and profits may be appointed thereof.

"3. And this Court doth further order that the petitioners be at liberty if they so desire to take proceedings for the sale of the said premises or any part thereof under or in pursuance of any power which they may have under the said security."

Why the order did not give leave to prosecute the remedy by entry, or generally any remedies to which the plaintiffs might be entitled under the mortgage, is not explained in the record. It is suggested that the Court considered the power of entry to be invalid; but it can hardly have been intended to make a final decision on such a point in the course of hearing a preliminary application for leave to sue, and not to allow it to be tried, if the plaintiffs desired it, in the regular course of litigation.

The important consideration, however, for the present purpose is, that the plaintiffs accepted the order and framed their bill in accordance with it. The bill does indeed contain allegations

that the plaintiffs demanded, and that the company refused, possession of the first division; and that the company deny the validity of the bonds, and of the mortgage, especially of the power to sell; and that owing to the antagonistic position of the company a sale can only be made effectually under the direction of the Court. But the company, while asserting that any entry by the plaintiffs would be illegal, deny that any demand for it had been made, and they deny that the right to sell has ever been discussed, or that they have adopted any antagonistic position as alleged by the plaintiffs. No evidence was given on these points; the bill was not amended; and the specific relief prayed by it was, as before stated, confined to a judicial sale and the appointment of a receiver.

It is under these circumstances that their Lordships are asked to treat the case as if the plaintiffs had proved a case of obstruction and difficulties raised by the company, either in derogation of their contract, or shewing such discrepancies in the construction of the contract as would entitle the mortgagees to come to the Court for a declaration of its true meaning before they take action to enforce it. The questions now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the Courts below. As the matter stands they have not been touched by the Courts below. When Mr. Robinson proposed to argue that the power of sale is invalid their Lordships were unwilling to hear him. They must equally refuse to hear (or at least to determine, for they have partially heard) discussions relating to the position of the plaintiffs in the event of an entry, or of the purchaser in the event of a sale. They confine themselves to deciding the issues which the Courts below were invited by the plaintiffs to decide, namely, whether there can be a judicial sale, and what it is that the receiver of the revenues of the division is entitled to receive. Finding that the Court of Appeal of Manitoba is right in its decisions, and that no alteration is requisite except the correction of an ambiguity in its decree, they will humbly advise Her Majesty to dismiss the appeal; and the appellants must pay the costs.

The mode in which their Lordships think that the decree

J. C. 1897 GREY v. MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA.

appealed from should be varied is by discharging paragraph 2 and substituting the following order:—

"Continue the receiver till further order. Declare that according to the true construction of the mortgage of the 16th April 1886 the revenues, freights, tolls, income, rents, issues, profits and sums of money thereby mortgaged were so mortgaged subject along with the other revenues of the company's undertaking to the working expenses of the defendant company's entire line of railway and telegraph which in the ordinary course of conducting such line would fall upon them. Declare that the receiver is, and since his appointment has been, receiver of the net earnings which by art. 18 of the said mortgage the company covenanted to apply to the payment of the bond debts thereby secured. Order the receiver to pay such net earnings into court to abide the further order of the Court or a judge thereof."

Solicitors for appellants: *Norton, Rose, Norton & Co.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1897 *Feb.* 2; *March* 10.

SALISBURY GOLD MINING COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

HATHORN AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Construction of Articles of Association—Power of Chairman to refuse Adjournment of a Meeting—Special leave to Appeal given at the Hearing—Practice.

At the hearing of an appeal it appeared doubtful whether the order appealed against was a final judgment or had the effect of a definitive sentence; but it also appeared that the questions in controversy on the face of the pleadings were of much importance, and that a determination

---

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

of them might put an end to further litigation. Accordingly special leave to appeal was granted.

An article of association provided that "the chairman may with the consent of the members present at any meeting adjourn the same, &c." :—

Held, that, upon the true construction thereof, the chairman is not bound to adjourn a meeting, even though a majority of those present desire the adjournment; and that he can, after rejecting a motion for adjournment, declare a provisional agreement specified in the circular convening the meeting to be confirmed.

Semble. Such confirmation is not affected by any statement of the chairman as to its effect even if incorrect.

APPEAL from an order of the Supreme Court (Sept. 17, 1895) directing the appellants' exceptions to the respondents' declaration to be overruled.

The appellant company is a joint stock company or partnership with limited liability under the Natal Statute, Law No. 10, 1864, and is governed by articles of association, of which the 66th is set out in their Lordships' judgment. The substantial question in the appeal was whether under that article a meeting of the company can be adjourned by the members, not only without the concurrence, but against the will of the chairman.

The pleadings and opinions of the judges in the Court below are sufficiently set out in their Lordships' judgment. The full report will be found in (1895) 16 Natal Law Courts, p. 193. The Supreme Court by a majority admitted an appeal to Her Majesty in Council after argument upon the respondents' contention that the order was not "a final judgment decree or sentence," nor "having the effect of a final or definitive sentence" within the Order in Council of July 9, 1870, relating to appeals from the Supreme Court of Natal. The judgments will be found in 16 Natal Law Courts, p. 210.

Thereupon the respondents petitioned Her Majesty in Council to rescind the order giving leave to appeal. The Judicial Committee, at the hearing of the petition on May 9, 1896, directed it to stand over and come on with the appeal; with liberty to the appellants to apply if necessary for special leave at the hearing.

Buckley, Q.C., Danckwerts, and *Gwynne James*, for the

J. C. 1897 SALISBURY GOLD MINING COMPANY v. HATHORN.

appellants, contended that the order appealed from was appealable as held by the Supreme Court. An order overruling a demurrer is not interlocutory: see *Trowell* v. *Shenton*. (1) [*Israel Davis*, for respondents, referred to *Sauvageau* v. *Gauthier*. (2) Their Lordships granted special leave without costs.] It was contended that no cause of action was disclosed by the respondents' declaration. Under the 66th article, which was probably framed with reference to the probable absence of shareholders and their consequent voting by proxy, the concurrence of the chairman is necessary to the adjournment of a general meeting, on which question proxies are not available.

The power vested in the chairman is a power to adjourn or not adjourn at his option, subject to this—that if he adjourns it must be with the consent of members present; if he does not adjourn, he may dispense with that consent. [Reference was made to *Reg.* v. *D'Oyly* (3); *MacDougall* v. *Gardiner* (4); *Waters* v. *Baker*. (5)]

Israel Davis, for the respondent, contended that the chairman was wrong in refusing to put the motion for adjournment, and that the respondents were entitled to have the same put to the meeting. It is the inherent power of every public meeting and of meetings of members of incorporated bodies to adjourn themselves, and the chairman's duty in the matter is merely ministerial. Art. 66 was not intended to give him the absolute power claimed. [He referred to *National Dwellings Society* v. *Sykes* (6); *Stoughton* v. *Reynolds*. (7).]

Counsel for the appellants were not heard in reply.

1897 *March* 10.

The judgment of their Lordships was delivered by

LORD HERSCHELL. This appeal arises in an action brought by the respondents in the Supreme Court of the Colony of Natal. They are duly registered shareholders in the appellant company, against whose secretary as representing the company

(1) (1878) 8 Ch. D. 318.
(2) (1874) L. R. 5 P. C. 494.
(3) (1840) 12 A. & E. 139.
(4) (1875) 1 Ch. D. 13.
(5) (1808) 15 Ves. 10.
(6) [1894] 3 Ch. 159.
(7) (1737) Fortescue's Rep. 168.

the action was brought. The respondents stated in their declaration that they sued for and on behalf of themselves and all others the shareholders of the company. The declaration alleged that an extraordinary or special general meeting of shareholders was held at Pietermaritzburg on July 9, 1895, and that the meeting was called for the purpose of enabling the shareholders to consider, and if deemed expedient to confirm, a provisional agreement said to have been entered into by the directors for the "flotation" of about 49 claims of the Rand Mines, Limited, and about 33¾ claims comprising the joint battery sites of the appellant company and the Jubilee Gold Company into a company to be registered under the limited liability laws of the South African Republic. The company was to have a nominal capital of 275,000*l.*, divided into 275,000 shares of 1*l.* each. It was further alleged that the circular convening the meeting said the shares would be dealt with as follows:—

(*a*) 80,000 shares shall be issued as fully paid up to the Rand Mines Company.

(*b*) 70,000 shares shall be issued as fully paid up to this company and the Jubilee Gold Company.

(*c*) 100,000 shares shall form the working capital of the new company, the underwriting of which has been guaranteed by Messrs. Eckstein and Company at par.

(*d*) 25,000 shares will be held in reserve.

The declaration then alleged that the chairman of directors of the appellant company who presided at the meeting held on July 9 explained that under the provision (*c*) set out above, Eckstein and Company were to have the 100,000 shares allotted to them at par, and that such shares would not be allotted to the public or to the shareholders of the defendant company, who would have no opportunity of subscribing to the same, whereas the terms of provision (*c*) did not bear the interpretation put upon them by the chairman, and did not authorize the action which the directors contemplated taking in the event of the proposals being accepted.

The declaration went on to allege that a motion for the adjournment of the meeting of July 9, 1895, until November 8,

J. C. 1897 SALISBURY GOLD MINING COMPANY v. HATHORN.

1895, was duly made and seconded, and if put to the meeting would have been carried, but that the chairman illegally and improperly declined to put the resolution, claiming that under art. 66 of the articles of association of the appellant company no such adjournment could take place without the consent of the chairman, who thereupon put the motion for the confirmation of the provisional agreement specified in the circular, which was lost on a show of hands, but a ballot being demanded the appellant company have assumed that the confirmation was then carried. The declaration further alleged that all proxies used at the vote by ballot must have been given by shareholders the majority of whom reside in Europe or elsewhere beyond the borders of the Colony, and whose knowledge of the agreement submitted for confirmation must have been derived from the first circular convening the meeting.

The plaintiff claimed—

(1.) A declaration that the motion for the adjournment of the meeting should have been submitted to the vote of the shareholders present, and that the action of the chairman in declining to put the motion was wrong and contrary to law.

(2.) A declaration that the motion if duly put would have been carried.

(3.) An order of the Court declaring the adjournment of the meeting for a period of four months from the date of the judgment in the action.

(4.) and (5.) That the resolutions which the company purported to pass at the meeting after the chairman refused to put the motion for adjournment should be declared void and invalid and be set aside and that the company should be interdicted from treating as valid and acting upon any such resolutions.

(6.) That the company should be interdicted from giving effect to any agreement by which Eckstein and Company would be allowed to subscribe for 100,000 shares at par in the intended new company, and by which the shareholders of the appellant company would be debarred from subscribing to any portion of such capital contrary to the meaning and intent of provision (*c*) as above set out.

The appellant company excepted to the declaration as shewing no grounds of action in that—

(*a*) The adjournment of the meeting in terms of art. 66 of the articles of association was at the discretion of the chairman.

(*b*) The provisional agreement put before and dealt with by the meeting was the provisional agreement set out in the notice and in the declaration.

(*c*) It was not alleged in the declaration nor is it the fact that the resolutions against the carrying out of which an interdict was sought were outside the powers of the meeting.

(*d*) There was no averment in the declaration that the plaintiffs would sustain damage, or that any of their rights would be infringed by the carrying out of the resolutions.

When the case came on for argument before the Supreme Court it was ordered that the defendant company's exceptions to the plaintiffs' declaration should be and the same were thereby overruled. This decision was arrived at by Gallwey C.J. and Wragg J., Beaumont J. dissenting.

The Chief Justice and Wragg J. expressed the opinion that the construction placed upon the 66th clause of the articles of association by the chairman was incorrect, whilst Beaumont J. was of the contrary opinion. The Chief Justice appears to have entertained the view that the refusal to put the motion for adjournment invalidated the subsequent proceedings. Wragg J. however reserved his opinion as to the effect of the chairman's action. An application was afterwards made to the Supreme Court for leave to appeal to Her Majesty in Council, and the leave prayed for was granted by a majority of the Court, Wragg J. dissenting.

It was contended before their Lordships that it was not a case in which it was competent for the Court below to grant leave to appeal, inasmuch as the order against which the appeal was brought was not a final judgment decision or sentence, nor was it a rule or order having the effect of a final or definitive sentence. During the discussion of this point before their Lordships it became evident that even if the order appealed against was not a final judgment, or an order having the effect of a definitive sentence, a point which had caused a difference

J. C. 1897 SALISBURY GOLD MINING COMPANY v. HATHORN.

of opinion in the Court below, and which was certainly open to doubt, the questions in controversy on the face of the pleadings were of much importance, and that a determination of them might put an end to further litigation. Under the circumstances, therefore, their Lordships thought it right, without occupying further time in the discussion of the preliminary question, to recommend Her Majesty to give special leave to appeal.

It may well be doubted whether in any view of the case the declaration discloses a good cause of action; but their Lordships think it desirable to pronounce judgment upon the construction of the 66th article, which it is asserted justified the course taken by the chairman, without expressing an opinion on the validity of the objection urged, that even if the chairman erred in not putting the motion for adjournment the action could not be sustained.

The article is in these terms so far as material: "The chairman may with the consent of the members present at any meeting adjourn the same from time to time and from place to place in Pietermaritzburg." Before discussing the language of this article it is important to notice the provisions of the articles which immediately follow. By art. 67 it is provided that "Upon all questions a show of hands shall in the first instance be taken, and the question shall be decided by such show of hands unless upon or immediately after such show of hands a ballot be demanded in writing by at least five members personally present entitled to vote, but no ballot shall be allowed on a question of the adjournment of the meeting." The 68th article provides that when the vote is being taken by show of hands each member present shall have one vote only, and proxies as such shall not be admitted to vote.

Their Lordships are of opinion that upon the true construction of art. 66 the chairman is not bound to adjourn the meeting even though a majority of those present desire the adjournment. If the intention had been that the majority of the members present should have the right to adjourn the meeting whenever they pleased, their Lordships think the article would have been differently worded. According to the terms of art. 66 it is the

"chairman" who may adjourn the meeting: it is to be his act, not that of the meeting or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman. It provides for the "consent" of the members present, which implies that the act is not theirs, but his. It is said that there is an inherent power in any meeting to determine on an adjournment if it pleases, and that it is the duty of the chairman to put any motion for that purpose made and seconded. Whether this be so or not in a case where no such articles are to be found as those now under consideration, their Lordships do not think it can be so in a case where the articles have expressly prescribed the conditions under which an adjournment may take place. It was contended for the respondents that the construction which the natural meaning of the language used suggests would lead to unreasonable results, and therefore could not have been that intended by those who framed the articles. It is true that it vests in the chairman large powers which might conceivably be used improperly by him; but, on the other hand, if there were no check upon the power of those present at a meeting to adjourn it to a future date, it is equally conceivable that a small minority of the shareholders might seriously prejudice the interests of the company and defy the wishes of the majority of its members. The facts stated in the declaration of the present action will suffice to illustrate this. The meetings are to be held at Pietermaritzburg; many of the shareholders reside in Europe or elsewhere beyond the borders of the Colony. They can vote by proxy, and so express their views on any proposed action by the company that may come before a meeting for consideration; but the articles provide that proxies are not to be used on the question of the adjournment of the meeting. This being so, a limited number of members resident in or near Pietermaritzburg might, by carrying motions for adjournment, defeat proposals which the great majority of the members thought in the interest of their company. It is, no doubt, possible that a chairman might abuse the power which their Lordships think

J. C. 1897

SALISBURY GOLD MINING COMPANY v. HATHORN.

vested in him; on the other hand, he may use it to protect the rights and interests of those who may be unable to be present. Their Lordships see no sufficient reason, then, for departing from what seems to them to be the plain and natural meaning of the language used.

What has been already said is enough to shew that this appeal must succeed; but it may be well to add, that in their Lordships' opinion the fact that after the motion for adjournment was rejected by the chairman the confirmation of the provisional agreement was declared carried can, in their opinion, afford no ground for complaint. The agreement which was thus confirmed was that specified in the circular convening the meeting, and no gloss of the chairman, even if incorrect, and no statement by him as to what was intended to be done under it, could modify or affect the confirmation of the specified agreement.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal, and in the Court below.

Solicitors for appellants: *R. S. Taylor, Son & Humbert.*
Solicitors for respondents: *Atkinson & Dresser.*

[PRIVY COUNCIL.]

DONA MARIA ABEYESEKERA HAMINI AND OTHERS . . . . . } DEFENDANTS;

AND

DANIEL TILLEKERATNE . . . . PLAINTIFF.

J. C.* 1897 Feb. 4, 26.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Fidei Commissum—Ordinances 21 *of* 1844, 10 *of* 1863, *and* 7 *of* 1871—*Will—Construction—Jus accrescendi.*

The law of fidei commissum is not altered by Ceylon Ordinances No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871.

Two spouses by joint will directed that after the death of the survivor the lands in suit should be created fidei commissum, so that they may not be sold, mortgaged, or in any way alienated, and that "the three children of their deceased daughter and their surviving daughter shall divide into two and inherit according to custom, and they and their descendants possess without interruption":—

Held, that, by the true construction of the will, the moiety devised to the three grandchildren was burdened with one fidei commissum, and not with three fidei commissa separately applicable to the three shares. Accordingly one-third share of such moiety did not vest absolutely in each institute, so as to pass to his heir-at-law not in the direct line of descent from the testators; but the whole vested in the three institutes jointly with benefit of survivorship and with substitution of their descendants.

APPEAL from a decree on review of the Supreme Court (Nov. 6, 1894) confirming a decree of the same Court (April 13, 1894), which reversed a decree of the District Court of Colombo (July 17, 1893).

The facts and pleadings are stated in the judgment of their Lordships.

The District Court held that no right in the trust estate passed to Isabella (represented by the respondent) absolutely, nor did any one-third share therein ever form part of her estate; but that the two appellants had been rightly in possession thereof under the terms of the fidei commissum.

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

J. C.
1897
DONA MARIA ABEYESEKERA HAMINI
v.
DANIEL TILLEKERATNE.

The respondent appealed to the Supreme Court, submitting, (1.) that Isabella having died issueless, such "descendants" as would have been entitled under the will to her share failed, and, the original testators being dead, the share that devolved on her became vested in her administrator as property to which she was absolutely entitled; and (2.) that under s. 20 of the Ceylon Ordinance No. 21 of 1844, in the case of property jointly possessed upon the decease of a joint tenant his share was not to belong to the survivors, but to form part of his estate, and that Isabella and the two appellants having been joint tenants of the property in dispute, her share as part of her estate vested on her death in the respondent as her administrator.

The Supreme Court (Lawrie and Withers JJ.) set aside the decree of the District Court, and declared that the respondent as administrator of Isabella's estate was entitled to one-third of a moiety of the lands in suit.

In review the two judges adhered to their judgment, and the district judge, who in the meantime had been promoted to the Supreme Court Bench, adhered to his, and the decree was accordingly confirmed by a majority.

Withers J. gave the following reasons in review:—

"I consider that the words of the will, namely, 'the three grandchildren of the aforesaid daughter and the second daughter shall divide in two and inherit according to custom, they and their descendants,' import an intention to assign to each of the three grandchildren a pars virilis in the property devised to them.

"If I am right in this construction of the will, the three devisees, who appear to be re conjuncti are, in effect, simply verbis conjuncti, and do not enjoy the benefit of accretion. If I am wrong, I retain the opinion that our Ordinance No. 21 of 1844 will not permit us to regard the three grandchildren as joint tenants with the right of survivorship. The 20th section of that ordinance seems to me clearly to enact that a will, which devises landed property to two or more persons jointly, shall be held to devise that property to them in common, unless there is an express provision in the will that the survivors

should become entitled to the whole estate. Such a provision is not to be found in this will.

"Nor, in my opinion, has this will been affected by the later Ordinance 7 of 1871, entitled 'An Ordinance to amend the law of property and to relieve trustees,' the 3rd section of which enacts as follows :—

"'All property, whether moveable or immoveable, which any person shall be possessed of or entitled to, in equal undivided shares, as trustees, shall be held by such persons as joint tenants with the right or quality of survivorship between or amongst them, in the same manner as subsists between or amongst joint tenants by the law of England, unless otherwise provided by the deed or instrument creating or establishing the trust upon which such property is to be held, anything by the Ordinance No. 21 of 1844 and 10 of 1863 to the contrary provided notwithstanding.'

"As I said, in my judgment under review, I think this section applies only to those who have a legal estate vested in them for the use of the beneficiaries named in the testament in which they are appointed trustees, and have no beneficial interest as well.

"On further consideration I wish to add a few words. Assuming the three grandchildren would be regarded by the Roman-Dutch law as co-devisees, to whom the principle of jus accrescendi would apply, and that if one of them died, without leaving any descendant, the survivors would take the entire moiety of the lands within the gravets of Colombo ; I can find no authority for the proposition that if one of the three grandchildren died leaving a descendant, and that descendant died, the survivors would take the whole. I cannot help thinking that the descendant on the death of his ancestor, being one of the three grandchildren, would be a tenant in common as to one-third share, with the two surviving grandchildren, who might still be joint tenants quâ two-third shares in the devise.

"I rest my judgment mainly, if not entirely, on the provisions of our ordinances, and as the authors of the joint will did not expressly declare that on the death of the descendant of one of the grandchildren, who should happen to die leaving a

J. C.
1897
DONA MARIA ABEYESEKERA HAMINI v. DANIEL TILLEKERATNE.

descendant, the survivors or survivor or their or his descendants should take the whole of the devise, the three grandchildren must be regarded as tenants in common and not as joint tenants."

Crackanthorpe, Q.C., and *W. D. Rawlins*, for the appellants, contended that the fidei commissum in question was in favour of the three grandchildren collectively and their descendants as one family or class; and that upon the death of Isabella without issue the right of possessing the one-third of a moiety which she had enjoyed accrued to the appellants, as the surviving grandchildren. The intention of the testators was to benefit their grandchildren and their descendants for not less than four generations. The fidei commissum could not be extinguished as to any part of that moiety while any grandchild or descendant of a grandchild existed without defeating the manifest intention of the will. There were not three separate fidei commissa separately applicable to separate thirds apportioned to the three grandchildren, so that one could come to an end while the others remained. One fidei commissum was created applicable to the whole moiety; and the jus accrescendi was intended to apply to it. The Ordinances No. 21 of 1844, s. 20, 10 of 1863, s. 15, do not affect the moiety in question; otherwise the case falls within the exception contained in each of those sections, or within the exception created by Ordinance No. 7 of 1871, s. 3. Reference was made to *Denyssen* v. *Mostert* (1); Van Leeuwen (Kotzé) (1881 ed.) vol. i. bk. iii. c. 8, para. 1, p. 375, "fidei commissum"; bk. iii. c. 6, s. 8, p. 365; 2 Burge's Colonial Law, 105, 115; Van Leeuwen, vol. i. p. 424, cxii., tit. Successio ab intestato; Van der Linden (Juta), p. 64.

The respondent did not appear.

1897
Feb. 26.

The judgment of their Lordships was delivered by

LORD WATSON. Simon Gomes Appohami and Maria Regina Perera Hamini, two Cingalese spouses, executed a joint will disposing of their whole estate real and personal, in November,

(1) (1872) L. R. 4 P. C. 236.

1858, at which time their issue consisted of one unmarried daughter, and the three children of a daughter deceased. The marriage was dissolved by the death of Simon Gomes in 1865. His widow died in the year 1873.

By the will it was provided that all the property belonging to the testators, after payment of the debts which they had incurred, should be possessed by the survivor of them; after which "the three children of Ana Catherina Gomes Lama Ettena (the deceased of our two children) viz., Dona Johana Maria Abayasekera Hamini, son of John Paulus Abayasekera Appohami, and Dona Leisa Abayasekera Hamini, these three and our second daughter Maria Marsina Gomes Lama Ettena; the three children of the aforesaid daughter, and the second daughter shall divide into two and inherit according to custom, and they and their descendants possess, without interruption. Furthermore, if there remain any balance still due after our paying the said debt during our lifetime from the income of the property, the same shall be paid by selling the lands situated beyond the gravets of Colombo. Should there be a balance still remaining due, it is directed that the same shall be paid by selling a land situated at Colombo which the children do not wish to retain; and moreover after the said debt is satisfied, the other lands within the gravets of Colombo are created fidei commissum, so that they may not be sold, mortgaged or in any way alienated, and in order that the said power (fidei commissum) may be effectual, we direct that the heirs shall pay to Saint Joseph's Church at Colombo the sum of five shillings annually." Two other bequests are made by the will; but the passage quoted contains the whole provisions which have any bearing upon the matter of this appeal.

At the death of the surviving testator, all the descendants appointed nominatim to take in that event were alive, with the single exception of John Paules, the grandson, who had died in November, 1868, leaving an only child, Isabella. Upon the determination of the surviving spouse's usufruct, it appears that probate of the will was obtained, and that thereafter their daughter entered into possession of the moiety destined to her, whilst one-third share of the remaining moiety was possessed

J. C. 1897

DONA MARIA ABEYESEKERA HAMINI v. DANIEL TILLEKERATNE.

by each of their two surviving grandchildren, and by their great grandchild Isabella who took the share of which her father was the institute.

Isabella died unmarried and intestate in October, 1873, and the share which she had enjoyed was taken possession of, and was held by the appellants Dona Maria and Dona Leisa, her paternal aunts, until August, 1892, when the present action was brought against them, before the District Court of Colombo, by the respondent, who is married to the widow of the deceased John Paules. The action is in the nature of an ejectment suit; and the plaintiff's title consists of letters of administration duly appointing him to administer the estate of his step-daughter Isabella. His success must therefore depend upon his being able to establish that, at the time of her death in 1873, a beneficial interest in the one-third of the moiety which is in question had vested absolutely in Isabella and was descendible to her heirs ab intestato.

The judge of the District Court, Mr. D. F. Browne, dismissed the action with costs; the learned judge holding that the descent of the share in dispute continued, after the death of Isabella, to be governed by the fidei commissum. On appeal to the High Court, his decision was set aside, and judgment entered for the respondent, by Lawrie and Withers JJ., who were of opinion that the share had vested absolutely in Isabella, unaffected by the trusts of the will. The case was heard, in review, by a full bench consisting of Lawrie and Withers JJ., together with Mr. D. F. Browne acting as a puisne judge, when, all the learned judges retaining their original views, the order of the High Court was confirmed.

The present appeal having been heard ex parte, their Lordships think it right to notice that, in his first judgment, Lawrie J. directed attention to the fact that neither in the respondent's plaint, nor in the defence is there any averment to the effect that the lands in controversy are situated within the gravets of Colombo, although, if not so situated, they would not be within the terms of the fidei commissum. There is no doubt a defect of averment upon that point; but, on the other hand, the pleadings of both parties appear to their Lordships

to be expressly framed upon the assumption that the lands are within the fidei commissum, and that according to its construction one way or another, the rights of the litigants must be determined. Their Lordships also find that Withers J., in his original judgment, states, that " the lands referred to are within the gravets of Colombo, and are admittedly the subject of a fidei commissum " ; and that the opinions delivered, on a rehearing, by the three learned judges, all proceed upon that footing. In these circumstances, their Lordships are satisfied that the appellants are entitled to have the case disposed of upon the same footing in this appeal.

Apart from the provisions of certain ordinances enacted by the Governor of Ceylon with the advice and consent of the Legislative Council, to which they will subsequently refer, the conflicting claims of the appellants and the respondent appear to their Lordships to depend, not upon any disputed principle of the Roman-Dutch law, but upon the construction of that part of the will which regulates the destination of that moiety of the testators' estate which was devised to the three children of their deceased daughter, and their descendants. If the will constitutes three fidei commissa, severally applicable to the shares destined to each of these children, the respondent would be entitled to prevail; because, in that case, the descendants of John Paules having become extinct in her person, the share of Isabella was unaffected by any substitution, and therefore belonged to her in fee. On the other hand, if the entire moiety was the subject of the fidei commissum, the right of Isabella was, at the time of her death, burdened with a substitution in favour of the institutes and the lineal descendants of the institutes, and no interest in the share which she enjoyed passed to her heir-at-law. There being no controversy raised in this suit with regard to the moiety possessed by Maria Marsina, the daughter of the testators, it is unnecessary to consider whether both moieties of the estate are included in the same fidei commissum, or are the subjects of separate fidei commissa.

Their Lordships have had little difficulty in coming to the conclusion that, according to the terms of the will, the entire moiety settled upon grandchildren is made the subject of one

J. C.
1897
DONA MARIA ABEYESEKERA HAMINI v. DANIEL TILLEKERATNE.

and the same fidei commissum. The bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, but of a gift of the whole to the three institutes jointly, with benefit of survivorship, and with substitution of their descendants. Following the terms of the gift, the substitution must be read as referring to the whole estate settled upon the institutes as a class. The words "and inherit according to custom" were obviously not meant to imply that the estate was to devolve in terms of law, so as to defeat the interests of heirs-substitute. They refer to the succession, not of the substituted heirs, but of the institutes, and simply indicate that the shares bequeathed to them are the same which they would have taken had there been no will. Their Lordships are accordingly of opinion, that no right of succession could arise, on her decease, to the heirs-at-law of Isabella who were not in the direct line of descent from the testators, so long as any person was in existence who could shew a title either as an institute or as a substitute under the provisions of the will.

It appears to have been argued in the Court below on behalf of the respondent, that assuming the effect of the will to be that which their Lordships have just indicated, the law has been altered by ordinances relating to the rights of joint tenants, so as to give Isabella an absolute fee of the third share which she possessed. The ordinances relating to the matter of joint tenancy are, No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871. Lawrie J. does not refer to or rely upon any of these enactments as a ground of judgment; but Withers J. was of opinion that, under the provision of the Ordinance of 1844, the destination of the will must be regarded as a devise to tenants in common, sine jure accrescendi.

Sect. 7 of the first of these ordinances enacts that when the owner of any landed property, or of an undivided share or interest in any such property, shall die, after the ordinance shall commence to take effect, and two or more persons become co-proprietors of undivided shares or interests in such property, whether under the will of such deceased owner, or as his heirs-at-law, it shall be the duty of the executor or administrator to

make partition of the property among all the persons entitled to shares or interests therein, whether as devisees or heirs-at-law of the deceased.

Sect. 2 of the Ordinance of 1863 provides that, when landed property shall "belong in common" to two or more owners, it shall be competent to one or more of such owners to compel a partition of the property, and also that, if partition be impracticable, the Court may direct a sale.

Sect. 3 of the Ordinance of 1871 enacts that all property, whether moveable or immoveable, which any persons shall be possessed of, or entitled to, in equal undivided shares, as trustees, shall be held by such persons as joint tenants, with the right or quality of survivorship between or amongst them, in the same manner as subsists between or amongst joint tenants by the law of England; notwithstanding anything by the Ordinances No. 21 of 1844 and No. 10 of 1863 to the contrary provided.

Not one of these enactments professes to deal with or alter the law of fidei commissum; and, in their Lordships' opinion, they cannot be construed as having that effect. The first and second of them appear to be limited to cases in which the persons interested, whether as joint tenants or as tenants in common, are full owners, and are not burdened with a fidei commissum; and, even if they were not held to be so limited, the partition which they authorize would not necessarily destroy a fidei commissum attaching to one or more of the shares before partition. The Ordinance of 1871 has no bearing upon the point, its enactments really being intended to prevent a lapse of trust title and administration, in the event of the death of one of a body of trustees holding equal undivided shares, although their title may not be that of joint tenants.

Their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to restore the judgment of the District Court judge, with costs to the appellants in both Courts below. The respondent must pay to the appellants their costs of this appeal.

Solicitors for defendants: *Clarke, Rawlins & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1897 *April* 8.

CORY BROTHERS AND COMPANY, LIMITED . . . . . } Appellants;

AND

THE OWNERS OF THE TURKISH STEAMSHIP "MECCA" . . . . } Respondents.

THE "MECCA."

Debtor and Creditor—Appropriation of Payments—Right to Appropriate—Intention of Creditor.

When a debtor pays money on account to his creditor and makes no appropriation to particular items, the creditor has the right of appropriation and may exercise the right up to the last moment, by action or otherwise; the application of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed. The rule in *Clayton's Case*, (1816) 1 Mer. 585, does not apply to a case where there is no account current between the parties, nor where from an account rendered or other circumstances it appears that the creditor intended, not to make any appropriation, but to reserve the right.

The decision of the Court of Appeal reversed.

The following statement of the facts is taken from the judgment of Lord Macnaghten.

In April, 1894, the appellants were the holders of four dishonoured bills of exchange accepted by, or on behalf of, a Turkish company called the Hamidieh Steamship Company. The bills had been given in payment for necessaries supplied in Egypt by the appellants, or their agents, to the steamships *Mecca* and *Medina*. The first bill, due April 7, was for 267*l*. 14*s*. on account of the *Medina*; the second, due April 26, for 176*l*. 5*s*. on account of the *Mecca*. The other two both fell due on the 27th of the same month. One was for 194*l*. 8*s*. on account of the *Mecca*, and one for 630*l*. on account of the *Medina*.

Money was coming to the Hamidieh Company, as owners of the *Mecca*, from underwriters in England for salvage services to the *Medina*, and it was arranged that Messrs. H. E. Moss

& Co., who were acting for the company in London, should pay a share of the amount, when collected, to the appellants, on an undertaking by them not to enforce their claim against the two vessels for three months. The undertaking was given by letter of June 22.

On August 15, 1894, the sum of 900*l.* was accordingly paid to the appellants by H. E. Moss & Co. The appellants gave a receipt for that sum expressed to be on account of moneys owing them by the Hamidieh Company, adding, "the drafts embodying this amount being in Egypt, we cannot now return them, but herewith agree to take no further action in connection therewith during the period agreed upon between us."

On August 22, 1894, a letter was written on behalf of the appellants to the manager of the company acknowledging the receipt of the 900*l.* The writer expressed a hope that it was the company's intention to remit at once the balance due, "namely," he says, "401*l.* 2*s.* 9*d.*, as per statement herewith . . . . and thus obviate the necessity of our taking further steps to secure it."

The statement which accompanied the letter of August 22, was headed :—

"August 22nd 1894.

"Messrs. The Hamidieh Company, Constantinople, in a/c with Messrs. Cory Brothers & Co., Limited."

Then followed particulars of the four bills with notarial expenses added. The bills were entered in order of date, but the *Medina* bill for 630*l.* came after the *Mecca* bill of the same date. A charge of 7*l.* 2*s.* 5*d.* for telegrams on August 22, and an item "to interest to date at 5 per cent., 20*l.* 6*s.* 4*d.*," which was the last item in the account, brought the total up to 1301*l.* 2*s.* 9*d.*; then a line was drawn, and the sum of 900*l.* was deducted from the 1301*l.* 2*s.* 9*d.*, thus shewing the balance of 401*l.* 2*s.* 9*d.*

The period of grace having expired, the present action in rem was brought against the *Mecca*, which was found at Cardiff in the beginning of October, 1894. The action was brought to recover the moneys due in respect of the necessaries supplied to the *Mecca*, and an account was delivered appropriating

H. L. (E.) 1897

CORY BROTHERS & Co. v. OWNERS OF TURKISH STEAMSHIP "MECCA."

THE "MECCA."

the 900*l.* to the *Medina* bills and legal expenses in connection with that vessel.

In addition to other defences which failed, the respondents pleaded that part of the money paid to the plaintiffs by H. E. Moss & Co. "was in respect of the whole amount sought to be recovered by the plaintiffs" in the action.

At the trial the defendants' counsel relied on the statement of account of August 22, 1894, as an appropriation by the plaintiffs of the 900*l.* towards the payment of the four bills in the order in which they were entered in the account, and contended that by such appropriation the *Mecca* bills had been paid.

Bruce J. held that the payment was, by law, appropriated to the earlier items in the account, and gave judgment for the defendants. The judgment was affirmed by the Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.)

The plaintiffs brought the present appeal.

1896. March 2, 3. *Sir Walter Phillimore* (*Bucknill Q.C.* and *Gerard Ince* with him) for the appellants. Where a debtor pays money to his creditor without appropriation the creditor has the right of appropriation and may defer the right till the jury have to give their verdict. The presumption, that when an account is made out by the creditor and no appropriation is expressly made the law appropriates the payments to the earliest items in point of date, is a mere presumption that the creditor so intended it, and like other presumptions may be rebutted. What ground is there for supposing that the appellants intended to appropriate the 900*l.* to the *Mecca* items? Their interest clearly was to make no appropriation until they knew to which vessel to appropriate—until they could effect a seizure. The statement of August 22 was not intended to act as an appropriation or in any other way than as a memorandum. *Clayton's Case* (1) has no application: there was no debit and credit account, no entry of items as in a banker's books, nothing to raise the presumption that the first payment in was to be appropriated to the earliest debits. Moreover "earliest" in the rule in *Clayton's Case* (1) means earliest in date; the

(1) 1 Mer. 585, 608.

rule cannot apply to a case where (as here) two of the items are of the same date. One must be entered before the other: it is a mere accident which is put first. The authorities do not support the decision appealed from. The most important points established by *Clayton's Case* (1) are the right of the creditor to appropriate when the debtor pays money without appropriating, and that the intention of the creditor is the governing principle. Mere entries in the creditor's books do not prove appropriation; it is not complete till communication to the debtor: *Simson* v. *Ingham*. (2) The presumption that payment is to be appropriated to the earliest items may be rebutted by evidence of the real intention: *City Discount Co.* v. *McLean* (3); *Henniker* v. *Wigg*. (4) The creditor may appropriate at any time before the jury have to decide: *Philpott* v. *Jones*. (5) And see Lindley on Partnership, 5th ed. p. 231.

Pyke Q.C. (*A. E. Nelson* and *H. S. Q. Henriques* with him) for the respondents. The statement of account of August 22 was intended to operate, and did operate, as an appropriation to the items in the order of their statement. If it was not so intended and there was no appropriation by the creditor a presumption of law arose to the same effect: *Clayton's Case* (1); *Hooper* v. *Keay*. (6) The principle applies even where there is a change in the firm: *Bodenham* v. *Purchas*. (7) The same principle was applied in *Ashby* v. *James* (8), so as to take a debt out of the statute which would otherwise have been barred. In the case of *In re Sherry* (9) Lord Selborne says that when a creditor enters payments into a particular account in his books he primâ facie appropriates to that account, and the effect is that the payments are appropriated according to priority in the entries. There is here no evidence of an intention contrary to the primâ facie presumption. The ignorance of the parties that the effect of the account was an appropriation to the

(1) 1 Mer. 585, 608.
(2) (1823) 2 B. & C. 65.
(3) (1874) L. R. 9 C. P. 692.
(4) (1843) 4 Q. B. 792.
(5) (1834) 2 A. & E. 41, 43.
(6) (1875) 1 Q. B. D. 178.
(7) (1818) 2 B. & Ald. 39.
(8) (1843) 11 M. & W. 542.
(9) (1884) 25 Ch. D. 692, 702.

H. L. (E.) 1897 — CORY BROTHERS & CO. v. OWNERS OF TURKISH STEAMSHIP "MECCA." — THE "MECCA."

earlier items does not prevent the operation of the rule in *Clayton's Case* (1); *Merriman* v. *Ward*. (2) The rule in *Clayton's Case* (1) therefore applies.

Bucknill Q.C. in reply.

The House took time for consideration.

1897. April 8. LORD HALSBURY L.C. (after stating the facts):—My Lords, it is said that the account dated August 22 brings the question within the authority of *Clayton's Case* (1), and, in order to see whether this is so, it is necessary to consider what *Clayton's Case* (1) was, and the reasons given by Sir William Grant, who decided it. That learned judge says: where an account current is kept between parties as a banking account, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other."

This rule, so formulated, has been adopted in all the Courts in Westminster Hall (see *Field* v. *Carr* (3)). It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; but the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule, and if it were necessary to decide it I confess I should have great doubt whether the transactions I have described would not themselves negative the application of such a rule. The letter of June 22 shews that the parties intended that the right of arresting the ship should be preserved, and that it was only to be suspended for the three months, and I cannot think that, knowing perfectly well what they were about, either of the parties could have supposed that the pay-

(1) 1 Mer. 585, 608. (2) (1860) 1 J. & H. 371.
(3) 5 Bing. 13.

ment was to be so appropriated as to release the *Mecca* from the liability to arrest; but, in truth, I think this case is not within the rule at all. This is not an account current; there is no setting one item against another; credit is given for the 900*l.* at the end of all the items. They are all separate transactions, and, although on one piece of paper, seem to represent only historically the transactions as they occurred. How the principle of Sir William Grant's decision can apply to two transactions of identically the same date I cannot understand. There is in respect of these items no earlier date: it is the mere fact that one precedes the other in its place on the paper. I think it would be extremely inconvenient in business to draw inferences from the shape or order of accounts, and I think it would be an altogether novel application of a principle which has been established so long that I should feel great reluctance to engraft a new application upon it.

In this case it appears to me that the letter and account negative any appropriation of the 900*l.* to any particular part of the indebtedness, and, as the plaintiffs were entitled to appropriate, I think they have done so by this action; and I therefore move your Lordships that the judgment be reversed and judgment be entered for the plaintiffs for 401*l.* 2*s.* 9*d.*

LORD HERSCHELL (after stating the facts (1)):—My Lords, it was held by the Courts below that the first three items in the account dated August 22 must be treated as discharged by the payment made, and that there was consequently nothing due in respect of the *Mecca* at the time this action was commenced.

It is contended on the part of the appellants that inasmuch as the payment was not appropriated by the debtors it was open to them to make any appropriation of it they pleased, and that not having prior to bringing the action made any other appropriation, they were entitled to treat the payment as made on account of the *Medina* items, and thus to maintain the action against the *Mecca*.

The case was treated in the Court of Appeal as governed by

(1) This judgment was in the absence of Lord Herschell read by Lord Macnaghten.

H. L. (E.) 1897 CORY BROTHERS & CO. v. OWNERS OF TURKISH STEAMSHIP "MECCA." THE "MECCA." Lord Herschell.

Clayton's Case. (1) No appropriation of the payment having been made at the time, it was held that it must be attributed as a matter of law to the first three items of the account, and that the items relating to the *Mecca* must therefore be treated as paid. I do not think the present case is governed by *Clayton's Case.* (1) It was there decided that where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made no account had been delivered by the appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct; they had never been brought into a common account. An account comprising all the items was for the first time made out and transmitted by the appellants to the respondents after payment was made. In the account thus made out credit was given for the 900*l.* which had been received. At the time of the payment, therefore, there was no account to the items of which the payment could by operation of law be appropriated. The question to be determined is what was the effect of the transmission to the respondents of the statement of account of August 22. It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and transmitting it to their debtors in the manner they did?

I have had some doubt whether it might not be regarded as indicating to the debtors an appropriation of the sum paid to the earlier items in the order in which they appear in the account. But upon a consideration of all the circumstances, including the correspondence between the parties, I have come to the conclusion that the appellants did not intend to make

(1) 1 Mer. 585, 608.

any such appropriation, and that the respondents were not entitled so to regard it.

LORD MACNAGHTEN (after stating the facts given above) :— My Lords, I have some difficulty in following the reasoning of the learned judges in the Court of Appeal. There seems to be an error in the shorthand notes, because the Master of the Rolls is made to say that the account came in the first instance from the company. But, if I understand his meaning aright, he does say that the account passing between the parties did not of itself operate as an appropriation, or afford any indication of an intention to appropriate it: it was as if each party in turn had said, "Here is the account. I do not appropriate." Kay L.J. treats the case as governed by *Clayton's Case* (1), to which the Master of the Rolls also refers. "I cannot see any reason," Kay L.J. says, "why *Clayton's Case* (1) does not apply to the facts before us." Later on, after stating the facts as they appeared to him, "That is," he observes, "the very case to which *Clayton's Case* (1) would apply." A. L. Smith L.J. seems to take the same view as the Master of the Rolls. "Neither party," he says, "appropriated the payments to anything." Then he adds: "the 900*l.* by the law goes to the earlier items." If what occurred in August did not amount to an appropriation, it is difficult to see why the appellants were not at liberty to make their election in October, when they found the *Mecca* at Cardiff. And certainly I am at a loss to understand what bearing the doctrine of *Clayton's Case* (1) can have upon the question.

Now, my Lords, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor. In 1816, when *Clayton's Case* (1) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the

(1) 1 Mer. 585, 608.

H. L. (E.) 1897 CORY BROTHERS & Co. v. OWNERS OF TURKISH STEAMSHIP "MECCA." THE "MECCA." Lord Macnaghten.

civil law, or at any rate, within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held and it is now quite settled that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal the payment received is to be attributed to the debt first contracted. Now, *Clayton's Case* (1) was this. Clayton had a current account with a firm of bankers. One of the firm died. Some time afterwards the bank failed. The customer's account was kept from first to last as one unbroken account. At the date of the death of the deceased partner the customer had a large balance to his credit. Afterwards he drew out sums which in the aggregate exceeded that balance. On the other hand, moneys were paid in from time to time to his credit, and at the date of the failure the balance in his favour was rather larger than it was at the date of the death. He claimed to attribute his drawings after the death to subsequent payments in. But Sir W. Grant said, No. He distinguished the case from authorities which had been cited in favour of the claimant by saying: "They were all cases of distinct insulated debts between which a plain line of separation could be drawn; but this is the case of a banking account where all the sums paid in form one blended fund, parts of which have no longer any distinct existence; neither banker nor customer ever thinks of

(1) 1 Mer. 585, 608.

saying this draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday. There is a fund of 1000*l.* to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts."

The facts of the present case are very different. There is no current account between the parties here. There was no account between them at all until the bills were dishonoured. The debts were distinct. But it is, I think, important to observe that even in cases primâ facie falling within the doctrine of *Clayton's Case* (1) the account between the parties, however it may be kept and rendered, is not conclusive on the question of appropriation. In a case in the Exchequer Chamber in 1874 (*City Discount Co.* v. *McLean* (2)), where there was a current and unbroken account between the parties, *Clayton's Case* (1) was pressed upon the Court. "I quite agree," said Bramwell B., "with the principle of the cases cited such as *Clayton's Case* (1) and *Bodenham* v. *Purchas* (3), and I think we ought to follow them when applicable. . . . But we must decide every case according to its own circumstances." "The true rule," added Blackburn J., "is that laid down in *Henniker* v. *Wigg* (4), which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary." The rule in *Clayton's Case* (1) was very much considered in *Hallett's Case* in 1880 (5) by the Court of Appeal, consisting of Sir George Jessel M.R. and Baggallay and Thesiger L.JJ. "It is a very convenient rule," said the Master of the Rolls, "and I have nothing to say against it

(1) 1 Mer. 585, 608.
(2) L. R. 9 C. P. 692.
(3) 2 B. & Ald. 39.
(4) 4 Q. B. 792.
(5) 13 Ch. D. at pp. 728, 738.

H. L. (E.)
1897
CORY BROTHERS & Co. v. OWNERS OF TURKISH STEAMSHIP "MECCA."
THE "MECCA."
Lord Macnaghten.

unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other considerations." "*Clayton's Case*" (1), observed Baggallay L.J., "was decided upon the principle that in the absence of any expressed intention to the contrary or of special circumstances from which such an intention could be implied, the appropriation of drawings out to the payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned; and so viewed the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in."

Now, if the rule in *Clayton's Case* (1), which certainly at one time was considered to be a rule of such force and stringency as to interfere even with the equity of following trust moneys into the bank account of a fraudulent trustee, is to be accepted with this qualification, and if an account stated between the parties is only evidence of appropriation of payments, it seems to me that, in order to determine the question at issue on this appeal, it is necessary to consider the circumstances of the case more closely than they were considered in the Courts below. If you look at the position of the parties when the payment of the 900*l.* was made, and the purpose for which the statement of account of August 22, 1894, was sent, and examine the terms of the account itself, and the letter which accompanied it, it is, I think, impossible to suppose that the appellants could have intended to appropriate the 900*l.* in a manner inconsistent with the rights which they asserted when they arrested the *Mecca*. It is, I think, equally impossible to suppose that they could have intended to renounce or waive their privilege of election.

It is quite clear that when the bills were dishonoured the appellants were alive to their rights. They intimated very distinctly that they were prepared to seize both the vessels which were then lying at Suez. It was this threat that brought

(1) 1 Mer. 585, 608.

the company to terms. For some time the appellants could not obtain any satisfactory assurance from H. E. Moss & Co. The Hamidieh Company put them off with empty promises. But at last the company got frightened, and on June 15, 1894, they wrote to H. E. Moss & Co., referring to the steamers and saying, "As Messrs. Cory Brothers & Co. threaten to take proceedings against both the above-named steamers if they will not promptly receive from us a satisfactory assurance that they will soon be paid, we beg you will not delay to give them such an assurance, otherwise the results will be very detrimental to the Hamidieh Company and to our Mr. Constantine A. Theodoridi." So on June 22 H. E. Moss & Co. gave the required assurance, on an undertaking by the appellants that they would not, for three months from that date, arrest any of the property of the Hamidieh Company, either in this country or abroad, unless meantime the amounts to be received from the salvage claims on underwriters should fall short of the amounts of the bills held by them. Now, after that I rather doubt whether it would have been right for the company to try and steal a march upon their creditors by attempting to appropriate the money so as to release any part of their property. However that may be, the receipt which was given on August 15 seems to shew that the intention of the parties was that at the expiration of the period of grace the appellants should be remitted to their original rights, giving credit on general account for any sums received. Again, it seems to me that the letter of August 22 conveyed a distinct intimation that the appellants would exercise their rights unless the balance were paid. It was for the purpose of shewing what the balance was, and for no other purpose whatever, that the account was made up. It is impossible to suppose that the appellants, while looking forward to exercising their rights in case of default, would have made up an account with the intention of releasing one of the two vessels when they could not tell upon which of the two they might be able to lay their hands. Then it seems to me that the very frame of the account affords some indication that it was not intended to apply the payment in discharge of the first three bills, for the interest on those bills is the very last

H. L. (E.) 1897 CORY BROTHERS & CO. v. OWNERS OF TURKISH STEAMSHIP "MECCA." THE "MECCA." Lord Macnaghten.

item in the account. If the intention had been to discharge bills which carried interest, it surely would have been intended at the same time to discharge the accrued interest on which no interest would be payable. If the company thought that the appellants intended to discharge the *Mecca* bills, why did they not, when they received the account, ask for their return? I cannot help thinking that if they had made such a request they would have received a very indignant reply. The result might have been the return of the cheque and immediate seizure of the two vessels, which would hardly have answered the company's purpose.

In the result I am of opinion that it was competent for the appellants to arrest the *Mecca* in October, 1894, and at that time to appropriate the money which they had received from H. E. Moss & Co. to the *Medina* bills.

I think that the appeal ought to be allowed.

LORD MORRIS. My Lords, I am of the same opinion.

Order of the Court of Appeal reversed with costs here and below; judgment to be entered for the appellants for 401*l.* 2*s.* 9*d.*; *cause remitted to the Admiralty Division.*

Lords' Journals, April 8, 1897.

Solicitors for appellants: *Ince, Colt & Ince.*
Solicitors for respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

THOMAS ABERCROMBY WELTON . . APPELLANT; AND JOSEPH JOHN SAFFERY . . . . . RESPONDENT.

H. L. (E.) 1897 April 8.

Company—Winding-up—Adjustment of Rights of Contributories—Shares issued at a Discount—Companies Act 1862 *c.* 89 *s.* 38—*Companies Act* 1867 *c.* 131 *s.* 25.

It being ultra vires for a limited company to issue shares at a discount or by way of bonus, although authorized to do so by the articles of association, the holders of shares so issued are not thereby relieved from liability, in a winding up, to calls for the amounts unpaid on their shares for the adjustment of the rights of contributories inter se, as well as for the payment of the company's debts and the costs of winding up.

The decision of the Court of Appeal, [1895] 1 Ch. 255, affirmed, Lord Herschell dissenting.

THE following statement of the facts is in substance taken from the judgment of Lord Davey.

The Railway Time Tables Publishing Company, Limited, was registered in January 1886 under the Companies Acts as a company limited by shares. The memorandum of association contained the following clause :—

"The capital of the company is 30,000*l.* divided into 6000 shares of 5*l.* each, with power to increase the capital, and to issue any shares in the original or in any new capital as preferential, or guaranteed, or deferred shares." No articles were registered with the memorandum. The regulations adopted for the conduct of the affairs of the company were, therefore, in the first instance, those contained in Table A in the first schedule to the Companies Act 1862.

All the original shares (except the ten subscribed for in the memorandum) were issued to the vendor as fully paid up under a registered contract, and it was not disputed that they were rightly so issued. They were dealt with, and large numbers of them were in the hands of the general public.

By a special resolution passed and confirmed on May 25 and

H. L. (E.) 1897 WELTON v. SAFFERY.

June 11, 1886, the capital was increased to 40,000*l.* by the creation of 2000 additional shares of 5*l.* each. Of these shares 600 were issued and paid up in cash, 500 were issued as "bonus shares," and the remaining 900 were issued as "discount shares." By a second resolution passed and confirmed on the same dates, new articles of association were adopted in the place of Table A. The material articles, for the present purpose, are those numbered 4, 41, 42, and 140.

4. "The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions, and at such times, as the directors think fit, and either at a discount, premium or otherwise."

41. "The company may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient."

42. "The new shares shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the company, and with a special, or without any, right of voting."

140. "If the company shall be wound up and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of holders of shares issued upon special conditions."

The bonus shares were issued to subscribers for debentures in the company as fully paid up, without any consideration in money or money's worth except the subscription for the debentures, two shares of 5*l.* each being issued to each subscriber for a 10*l.* debenture. The discount shares, after being offered to the existing shareholders at the price of 1*l.* per 5*l.* share, were issued to Mr. Henry Hoare, as fully paid up, in consideration

of the payment of 10*s*. per share, or (in other words) at a discount of 4*l*. 10*s*. per share.

The appellant was the holder of 215 bonus shares, which he acquired for a nominal consideration from Hoare. The appellant had been placed on the list of contributories for the whole of these 215 shares as wholly unpaid.

The appellant was also the holder of 4460 discount shares which he also acquired from Hoare for a nominal consideration. The appellant had been placed on the list of contributories as the holder of 4460 shares upon which 4*l*. 10*s*. remained unpaid.

The appellant was also the holder of 1680 preference shares. The allotment of these shares was part of the consideration for the extinction of a debt of 13,000*l*. odd, due from the company to Hoare. By an order of June 14, 1893, these shares were held to be as to 1112 fully paid, as to 567 wholly unpaid, and as to one paid to the extent of 2*l*. 10*s*.

By an extraordinary resolution, dated March 25, 1892, it was resolved that the company be wound up voluntarily. By an order of April 13, 1892, the voluntary winding-up was continued, subject to the supervision of the Court. The respondent was the liquidator of the company.

Calls were made in the winding-up for the payment of the debts of the company and the costs of winding up. No question now arose as to these. The respondent having taken out a summons for a final call upon the bonus, discount, and preference shares to enable the liquidator to adjust the rights of the contributories inter se, Kekewich J. on August 7, 1894, held that the appellant was responsible for the amount remaining unpaid on his shares not only for the payment of the debts and costs of the winding-up, but also for the adjustment of the rights of contributories inter se, and ordered accordingly.

This order was affirmed by the Court of Appeal. (1) From these decisions the present appeal was brought.

1896. March 17, 23, 24. *Swinfen Eady Q.C.* (*Eve Q.C.* with him) for the appellant. The question raised by this appeal was left undetermined in the *Ooregum Case* (2), namely, whether

(1) [1895] 1 Ch. 255. (2) [1892] A. C. 125.

H. L. (E.) 1897 WELTON v. SAFFERY.

the holders of shares issued at a discount are liable to calls for the adjustment of the rights of contributories inter se, it being admitted that they are liable to calls for the payment of the debts and costs of winding up. The articles of association expressly authorized the issue of shares at a discount, and thus a contract was made between the shareholders that so far as the rights of contributories inter se were concerned the holders of such shares should pay no more than the stipulated amount, and this contract ought to be enforced, not against creditors, but inter socios so far as it lawfully can. There is nothing in the Companies Acts to prohibit the shareholders from entering into a contract with each other by which some shall pay less for their shares than others. It is only when the rights of creditors in a winding-up intervene that the issue of shares at a discount becomes unlawful. Various classes of shares may be created, with different priorities and preferences both as regards dividends and repayment of capital in a winding-up. The question thus becomes only a matter of drafting, and internal arrangement. Distinctions may lawfully be drawn between different classes of shareholders—shares, e.g., may be issued at a premium. Why should there not be a valid contract between the parties that some shares should be issued at a discount? There is nothing in the Acts inconsistent with such a power. By s. 7 of the Act of 1862 the liability of members is either the amount unpaid on their shares or such amount as they may undertake by the memorandum to contribute in case of winding up. Apart from winding up there is no statutory liability to pay up the full amount of shares. Sect. 8, which requires registration of the amount of capital, does not make it necessary for the company to issue all its capital. By s. 12 large powers are given to increase and rearrange and redistribute the capital. Sect. 38 is inconsistent with the restriction which the respondent seeks to impose: sub-s. 6 in particular provides for inequalities between shareholders. Sect. 109, by which the Court is to adjust the rights of contributories and the distribution of surplus, taken in connection with art. 140 authorizes what has been done. As far as this House is concerned the matter is res integra. But it is

admitted that in principle this case cannot be distinguished from *In re Weymouth and Channel Islands Steam Packet Co.* (1) *In re Almada and Tirito Co.* (2) does not determine the present question.

[LORD HERSCHELL referred to *Birch* v. *Cropper*. (3)]

In *McKewan's Case* (4), which was under the Act of 1856, effect was given to a contract by which shareholders were to pay in excess of statutory liability—but the principle is the same: per Jessel M.R. (5) In this connection see also *In re Maria Anna and Steinbank Coal and Coke Co., Maxwell's Case* (6); *In re Bangor and Portmadoc Slate and Slab Co.* (7)

There is nothing in *Trevor* v. *Whitworth* (8) adverse to the appellant's contention, and *Birch* v. *Cropper* (3) is favourable to it. In the *Ooregum Case* (9), though it was held that a company cannot issue shares as fully paid up for a money consideration less than their nominal value, Lord Watson (10), Lord Herschell (11), and Lord Macnaghten (12) intimated their opinion that a valid contract might be made between a company and certain of its shareholders not to call upon such shareholders for payment beyond a sum agreed upon, except in case of winding up, and then only so far as might be necessary for the debts and costs of winding up. What the rights of contributories inter se are is left undetermined by the Companies Acts; it is certainly not expressly provided that every shareholder shall make the same contribution; nor can this be inferred from any of the enactments.

Renshaw Q.C. and *Whinney* for the respondent. There are two questions—one of law whether it is competent by any means to issue shares at a discount, and one of fact, assuming that such a limitation of liability is possible, whether any valid contract to that effect has been made. The question of law is concluded by decision, and here there is no contract in fact cutting down the appellant's liability. A special resolution

(1) [1891] 1 Ch. 66.
(2) (1888) 38 Ch. D. 415.
(3) (1889) 14 App. Cas. 525.
(4) (1877) 6 Ch. D. 447.
(5) 6 Ch. D. at p. 458.
(6) (1875) L. R. 20 Eq. 585.
(7) (1875) L. R. 20 Eq. 59.
(8) (1887) 12 App. Cas. 409.
(9) [1892] A. C. 125.
(10) [1892] A. C. at p. 138.
(11) [1892] A. C. at pp. 143–4.
(12) [1892] A. C. at pp. 147–8.

H. L. (E.) 1897 WELTON v. SAFFERY.

cannot have the effect of such a contract—to allow it to do so would lead to fraud and abuse. The powers conferred by the Act of 1867, s. 24, were already exhausted when these resolutions were passed, and the conditions of that section have not been fulfilled. The operative section is s. 25 of that Act, which requires payment in full in cash.

The special resolutions passed at the general meetings were invalid; such resolutions cannot alter the constitution of the company: *Hutton* v. *Scarborough Cliff Hotel Co.* (1) The memorandum implies equality between all the shareholders, and any deviation from that equality must be authorized in the original constitution of the company. The reasoning of Bowen L.J. in the *Weymouth Case* (2) is applicable here, and is absolutely conclusive. There is no such contract as is alleged; no such contract could be validly made.

[LORD DAVEY referred to *In re Addlestone Linoleum Co.* (3)]

[They also cited *In re Newtownards Gas Co.* (4), *In re Gibson, Little & Co.* (5), and *Burgess's Case.* (6)]

Swinfen Eady Q.C. in reply.

The House took time for consideration.

1897. April 8. LORD HALSBURY L.C. (after stating the facts):—My Lords, in respect of the liability to pay up the shares so far as it is necessary to satisfy creditors and the cost of winding-up, I believe no doubt exists in the minds of any of your Lordships. Since the *Ooregum Case* (7) in this House it would be impossible to contend that that question is not covered by authority. But it is said that, where the only object in making a call is to settle the rights of the shareholders inter se, the law laid down in the *Ooregum Case* (7) does not conclude the question.

My Lords, I am unable to accede to that view. I think the Legislature, in permitting the existence of a company limited

(1) (1865) (A) 2 Dr. & Sm. 514, on appeal, 4 D. J. & S. 672; (B) 2 Dr. & Sm. 521.
(2) [1891] 1 Ch. 66, at p. 81.
(3) (1887) 37 Ch. D. 191.
(4) (1885) 15 L. R. Ir. 51.
(5) (1880) 5 L. R. Ir. 139.
(6) (1880) 15 Ch. D. 507.
(7) [1892] A. C. 125.

by shares and with limited liability, created a machinery which makes it impossible by any expedient, either by company or shareholder, to act otherwise than in pursuance of the provisions of the statute. Whether for the purpose of settling the rights inter se, or for the purpose of satisfying creditors, it appears to me that the statute enforces upon company and shareholder alike conformity to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount. I think that is the decision in the *Ooregum Case* (1), and though I am aware that a different view has been suggested where the question is not the payment of the debts of the company, but the settlement of the rights of the shareholders inter se, I am unable to see how this artificial creature, limited within its sphere of action by the statute under which it is created, can do anything contrary to the provisions of the statute. It is not a question for what purpose it is done. Dealing with it as I think it must be dealt with, as an artificial creation, it can only act as a company or as shareholder in either of those characters within the fetters created by the Act of Parliament.

It is said, and I think justly said, that people have been invited to take shares under an article of association which expressly provided that shares might be issued at a discount. It is, I think, hard for persons who have relied upon that assurance to find out that the article which authorized the issue of the shares at a discount was ultra vires of the company, because it is in conflict with the memorandum of association which by the statute itself must determine the rights in that respect; but not the less on that account must one insist that the statute must be obeyed. If one were to suppose that the whole 6000 original shareholders or persons who became shareholders by purchase in the market were to have agreed that these shares should only be regarded as having 10*s*. due upon them, each of them might perhaps against himself establish some contract by which the person agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder—it would be in his capacity as

(1) [1892] A. C. 125.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Halsbury L.C.

individual. The liquidator can only recognise shareholders, and their relation to the company of which they are shareholders must be regulated by the Act of Parliament.

The right to have a call made where it is necessary to adjust the rights between the different shareholders themselves appears to me not less imperative than if only the creditors were in question. The supposed bar to such a proceeding is the agreement not to ask more than 10*s*. per share upon the discount shares; but the whole question goes back to the same point. If the Legislature has prohibited that, there is no such agreement. The directors have no power to make such an article. The company quâ company have no power to agree to such an article, and those who have taken shares and paid for them in pursuance of the Act of Parliament, I think, have a right to have the shares paid up which the Act of Parliament has enacted shall be liable to that payment.

In truth, though in form reserved by the discussion in the *Ooregum Case* (1), I think the *Ooregum Case* (1) does decide the question now in debate, and whether they were bonus shares upon which nothing was paid, or discount shares upon which 10*s*. only was paid, the holders of those shares are, in my judgment, liable to make good for any company purpose the amount of the money which, upon the face of the share, they undertake to pay.

My Lords, I confess it seems to me, however hardly it may operate upon individuals, to be a just and right thing that those who have completely discharged their statutory obligations should have a right to call upon the other shareholders to do as they have done and pay what is due upon the shares.

No question as to the preference shares is really in debate.

For these reasons I am of opinion that the order appealed from ought to be affirmed and this appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, I need not refer in detail to the facts of this appeal which are fully explained in the judgments which are yet to be delivered by my noble and learned friends.

(1) [1892] A. C. 125.

But I find it necessary to indicate briefly the considerations upon which my decision rests, because I apprehend that they are not altogether the same with the reasons which have influenced some of the noble and learned Lords with whom I agree in result.

In dealing with the questions which arise for our decision, there appear to me to be two points which must be kept in view. The first of these, which is now beyond the range of controversy, is, that the provisions of the Act of 1862, as they have already been interpreted by the House, make it unlawful for a company incorporated with limited liability to issue at a discount any of its shares, whether ordinary or preference. The second point, which has not, in my opinion, been definitely settled by authority, involves the construction of the enactments of s. 25 of the Companies Act, 1867. The decision of the House in *Ooregum Gold Mining Company of India* v. *Roper* (1) carries that construction thus far—that no member of a limited company who is not protected by a proper contract, duly registered in terms of the clause, can have a good defence against payment of such proportion of the nominal amount of his shares as has not been paid in cash, when payment is required by the liquidator for the purpose of meeting the claims of creditors of the company, or the cost of liquidation.

The appellant is the holder of shares which were issued at a discount, in pursuance of a power reserved to the company by its memorandum of association "to issue any shares in the original or in any new capital as preferential or guaranteed or deferred shares," and of power conferred upon the directors by its articles of association to issue new shares "upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors shall determine, and, in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of the assets of the company, and with a special or without any right of voting." I need hardly observe that a power expressed in these wide terms could give the directors no right to issue shares at a discount—a right which would be contrary to

(1) [1892] A. C. 125.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Watson.

statute even if it were expressly conferred by the memorandum of association. That proposition is not disputed by the appellant, who admits that, if the call which is sought to be enforced in this case had been made upon him by the liquidator for the purpose of paying creditors or cost of liquidation, he would have been liable, notwithstanding the immunity purporting to be attached to the issue of his shares. But the call is not made upon him for either of these purposes. The creditors of the company have been paid in full, and the cost of liquidation has been provided for out of the assets of the concern and of calls made upon and responded to by the ordinary shareholders. In these circumstances, the appellant maintains that the condition of immunity from calls, although ineffectual in law to the extent which he concedes, constitutes a contract valid inter socios, and binding upon the company and its ordinary members in all questions between them and the holders of these discount shares. Upon that ground he contends that he is not liable in any contribution in respect of his shares, because it is an admitted fact in the case that the sole object of the liquidator in making a call upon him is to repay to the ordinary shareholders money which they were under an obligation to pay, so as to keep him indemnis.

I am not prepared to affirm that the enactments of s. 25 of the Act of 1867, which were certainly meant to give further security for payment to the creditors of the company, were also intended to take away, or even impair, any right to make future arrangements between ordinary shareholders and holders of shares issued at a discount, through the medium of the company, in regard to the privileges to be borne by those discount shares, which could have been lawfully made under the previous Companies Acts. No such arrangement can now be made, or, so far as I am able to judge, could ever have been lawfully made, to the effect of relieving shareholders in the position of the appellant of any part of their statutory liabilities to the creditors of the company. The rights and liabilities inter se of the members of different classes of shareholders, in relation to matters which do not concern or affect the interests of creditors, do not appear to me to stand upon the same

footing. I can find no provision in the statute which either expressly or by implication enacts that ordinary shareholders desiring to raise additional capital by the issue of shares at a discount may not through the company undertake that the sum required to pay creditors in liquidation, and the costs of liquidation, shall be charged primarily upon the unpaid capital which they are liable to contribute, and that no contributions shall be required from the discount shareholders for the purpose of reimbursing them, or for any other purpose than meeting debts and costs of liquidation. Assuming always that proper means are employed for accomplishing that object, it is, in my opinion, perfectly lawful. It is true that no arrangement can be made which trenches upon the rights conferred by statute upon creditors. But, in so far as concerns what may be described as the free assets of the company, meaning by that expression its surplus assets remaining after paying all debts and costs of liquidation, the sole interest is in the members who are the units of the incorporation. It has never, so far as I am aware, been disputed that a condition may be lawfully attached to the issue of shares to the effect that, in the event of there being at any time funds available for the declaration of a dividend, these shares shall carry a higher, or it may be a lower, dividend than the original shares. And in like manner it is, according to my apprehension, a lawful condition that, in the event of there being surplus assets when the company is wound up, such surplus shall be apportioned, according to any rule which may be agreed on, amongst the different classes of shareholders. The truth is, that all these are domestic matters, in which neither creditors nor the outside public have any interest, and with which, in my opinion, it is the policy of the Legislature not to interfere.

I desire to add that, in my judgment, when conditions for which due provision is made in the constitution of the company are sanctioned by its shareholders, and are inserted in the contract under which a shareholder accepts his shares, such conditions, if they be of the character which I have just indicated, will form an integral part of the contract, and be enforceable by the shareholder either against the company or

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Watson.

its liquidator. The difficulty which I have felt in this case is one which I casually encountered, without requiring to solve it, in *Ooregum Gold Mining Company of India* v. *Roper*. (1) In the present case, my difficulty assumes this form: do the contracts, under which the appellant's shares were issued and accepted by him, contain a severable and valid condition that the holders of such shares shall not, in the event of the company going into liquidation, be liable to make any payment for the purpose of equalising the contribution of ordinary and "discount" shareholders?

In all these cases the resolution of the shareholders giving authority for the increase of capital, and the issue of shares by the directors in pursuance of such authority, are in practically the same terms. The authority given was to issue the shares at a discount; and, although part only of their nominal amount had been paid, they were issued by the directors as fully paid up. It does not therefore admit of doubt, and it is not disputed, that the issue of the shares on these terms, and the resolutions authorizing it, were ultra vires of the shareholders, the directors, and the company. Viewed in its integrity, the condition that partly paid shares should be issued as fully paid up was an absolute nullity, and so was the authority given to issue them on these terms. But the appellant argues that the condition, when resolved into its component elements, must be held to comprise, not a single stipulation, but a whole nest of stipulations, one of which only—that which exempts the shareholder from liability for debts and costs of liquidation—is ultra vires, and therefore contrary to law. He accordingly maintains that, whilst the condition must be disregarded in so far as it involves any stipulation which can be shewn to be ultra vires, it must be treated as a valid and subsisting contract, protecting him against any and every kind of liability in respect of his shares from which the company, with the sanction of its members, could have given him exemption in express terms, and by a separate and substantive condition. I entertain considerable doubts whether, having regard to the terms of the condition and to the vice by which it is affected, it is capable of being

(1) [1892] A. C. 125, 139.

dealt with in the manner proposed by the appellant; but I do not consider it necessary to determine that point. Apart from the rule of ultra vires, it appears to me that the contract is not one which can be so severed into parts. I find it impossible to speculate what form the arrangement might have assumed, if the parties had at the time known and believed that the issue of shares at a discount was contrary to the statute law. The position of the appellant is no doubt a hard one, but it results from the original allottee of his shares having relied on a mistaken view of the law; and I am apprehensive that an attempt to sever the condition in the manner proposed might result in making a contract for the parties which they had not in their contemplation.

For these reasons, I concur in the judgment moved by the Lord Chancellor.

LORD HERSCHELL. (1) My Lords, the questions which arise in this case are of far-reaching importance. They concern not only the parties to this litigation, but the shareholders in many other public companies. The facts are somewhat complicated, because they relate to three different classes of shares held by the appellant. [His Lordship stated them.]

I will consider, in the first instance, the case of the shares issued at a discount, that is to say, the 5*l.* shares, which were issued as fully paid up in consideration of the payment of 10*s.* per share. There can be no doubt, after the decision in the case of the Ooregum Gold Mining Company, that the issue of the shares at a discount was so far invalid that it did not prevent the holder of them from being liable to contribute to the full amount of the shares for the purpose of paying the creditors of the company. Whatever the dicta bearing on the point, that case did not determine the question what was the effect of such an issue as regards the shareholders inter se in the case of a winding-up of the company. The decision was mainly founded on the 8th and 38th sections of the Act of 1862, and on s. 25 of the Act of 1867. A careful consideration

(1) This judgment was in the absence of Lord Herschell read by Lord Watson.

H. L. (E.) 1897

WELTON v. SAFFERY.

Lord Herschell.

of these provisions is essential to a correct view of the limits of the decision referred to.

The 8th section prescribes that, in the case of a company formed on the principle of having the liability of its members limited to the amount unpaid on their shares, the memorandum of association shall state, inter alia, the amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount. This fixed amount is by s. 38 to be the limit of the shareholder's liability in case the company is ordered to be wound up. I think it very important to observe that the statement in the memorandum of association just mentioned as prescribed in s. 8, and to which so much weight was attached in the *Ooregum Case* (1), applies only to companies with limited liability. By the express terms of s. 10 of the Companies Act, 1862, where a company is formed on the principle of having no limit placed on the liability of its members the memorandum of association need not contain any such statement. This appears to me to shew that the provision contained in s. 8, sub-s. 5, was enacted for the purpose of protecting the creditors of a company the liability of the shareholders of which was limited. They were not to be liable beyond the fixed amount stated, but they were to be liable to that amount, and the design was that the memorandum should give notice to all who trusted the company of the extent of the members' liability. The enactment, in my opinion, does not and was not intended to determine the rights or liabilities of members of the companies inter se.

So far as regards the members of the company inter se there were no more reasons for hampering them in any arrangements they might choose to make as to the interests they should have in the capital or assets of the company, or as to the proportion in which they should share its profits or discharge its liabilities, in the case of a limited than of an unlimited company.

The 38th section provides that in the event of a company being wound up every member of such company shall be liable to contribute to the assets of the company to an amount suffi-

(1) [1892] A. C. 125.

cient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with certain qualifications, of which the following is one: "(4.) In the case of a company limited by shares no contributions shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." It is to be observed that, apart from the qualifications, the enacting part of s. 38 applies equally whether the liability of the member is limited or unlimited. What the rights of the contributories amongst themselves are, for the adjustment of which members are to contribute the sums required, is not determined by any enactment of the Companies Act. It is not provided that, for the purpose of such an adjustment, every member shall be liable to contribute to the assets of the company such a sum as will make the payment of each member the same in respect of each share which he holds. How, then, are the rights of the contributories inter se to be ascertained? I reply, from the terms of the articles of association of the company, and the acts done by the company under the powers conferred by them.

In the absence of any provision to the contrary it would, no doubt, be right to assume that every shareholder was intended to contribute an equal sum in respect of his share, and calls would be rightly made for the purpose of enforcing this equality. The statute, however, does not provide that the liquidator shall make calls for the purpose of equalising the payments made by the contributories in respect of their shares, but only that he shall make them for the purpose of adjusting the rights of the contributories. What those rights are and what payments must be made to adjust them are left undetermined by the statute. It no more requires that inter se every shareholder shall contribute alike to the funds of the company, or share alike in the distribution of its surplus assets, than it does that shareholders who have contributed the same amount to its capital shall take the same share of the profits it earns. In the absence of any provision to the contrary, each

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Herschell.

shareholder could, no doubt, claim a share of the profits proportionate to the share in which he had contributed to the capital. But it is, of course, every day experience that the articles of a company provide for preference shareholders who are to receive a certain payment out of the profits before the other shareholders receive anything.

I think, then, it is a fallacy to assume that the liquidator may in all cases make calls upon shareholders in order to equalise the payments in respect of all the shares. I can find no warrant for such a proposition in the provisions of the statute, and, for the reasons I have given, it does not seem to me in the least to follow from the circumstance that every shareholder is under the statute liable to pay the amount unpaid on his share.

What calls may be made in order to adjust the rights of the contributories inter se is, in my opinion, in no way determined by the decision in the *Ooregum Case* (1), that the holder of every share in a limited company is "liable" to pay in cash the amount of his share. It no more determines to what extent this liability may be enforced in a particular case to adjust the rights of contributories than it does to what extent it can be enforced for the purpose of paying the debts of the company and the expenses of the liquidation. In the latter case the amount of calls which can be made, within the limit of liability, depends upon the amount of the debts and expenses, in the former upon the rights of the contributories inter se, whatever they may be. But the liability to pay the amount of the share fixed by the memorandum no more ascertains what those rights are than it does the amount of the debts and the expenses of the liquidation.

I have already drawn attention to the fact that the provision we are considering applies alike to unlimited and limited companies. How are the rights of the contributories any more determined by the fact that in the latter companies there is liability only to a certain amount than they are in the former case by the fact that the liability is without limit, or why in the one case more than in the other must calls be made,

(1) [1892] A. C. 125.

independently of the provisions of the articles for the purpose of equalising the payments of the members?

Sect. 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute; but, as I have said, the statute does not purport to settle the rights of the members inter se, it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights.

I think it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives.

It is for this reason that I cannot agree with the view taken by the Court of Appeal in the case of the *Weymouth and Channel Islands Steam Packet Co.* (1), and which was pointedly put by Bowen L.J., that in order to maintain the proposition for which the appellant here contends it is necessary to imply a contract between the individual members apart from the provisions to be found in the articles. Nor can I agree that the contract made by those who take shares issued at a discount is an "illegal" contract, though it is no doubt ineffectual to enable the holder to escape from further calls for

(1) [1891] 1 Ch. 66.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Herschell.

all purposes for which, by s. 38 of the Act, contributions may be enforced.

It was not denied by the learned counsel for the respondent that the articles might provide for different classes of shareholders having different rights: that, for example, members might be entitled to a preference in respect of dividend or in the distribution of the assets of the company. I can see nothing in the statute to prevent the articles of a company providing for any such differences in the rights and liabilities of the members, inter se, as may be thought expedient. Indeed, to take an example, s. 24 of the Companies Act, 1867, expressly recognises that a company may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of the calls to be paid, and in the time of payment of such calls.

There is nothing, in my judgment, in the 25th section of the same Act which militates against the view I have expressed. It provides that every share in a company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a duly filed contract. I do not question that the shares issued at a discount in the present case must be deemed to have been issued, and to be held on those terms; but this does not determine the amount of contribution which the liquidator is entitled to require from a member. That must be ascertained by inquiring how much, beyond what is necessary to pay the debts of the company and the expenses of winding-up, is requisite in order to adjust the rights of the members inter se. The argument for the respondent involves the assumption that, after the debts and expenses of winding-up are provided for, every member must be bound in respect of each share he holds to contribute an equal sum to the funds of the company in order to adjust their rights—an assumption for which I can see no warrant in the statute. I have, therefore, arrived at the conclusion that there is nothing to prevent a company providing by its articles that certain members or a certain class of members shall, as between themselves and other members, be entitled to an equal share in the

assets of the company, although they have made smaller payments in respect of their shares, and that they shall not be bound to contribute more than a specified amount, although this may be less than the amount which they are liable to contribute for the purpose of paying the debts of the company and the expenses of winding-up.

The next questions which arise are, have the company done so in the present case, and how ought the rights of the members amongst themselves to be adjusted? The articles of the company distinctly authorized the directors to issue the shares at a discount, that is to say, on the terms that on payment of less than their full amount they should be treated as fully paid up, and they were issued on the terms that the person taking them should not be liable to pay more than 10*s*. per share in respect of them. At the time this was done there was judicial authority for the view that this could lawfully be done even to the extent of exonerating the holder from further liability for the purpose of satisfying the debts of the company. There can be no doubt that both those who took the shares and the other members of the company intended and anticipated that no further call should be made upon them. In so far as the claims of creditors are concerned, it has since been held that the provisions of the statute render the attempt thus to limit the liability to something less than the amount of the shares nugatory, even though all the members of the company had expressly determined that this should be done. But is there anything to prevent its being binding, so far as the members themselves are concerned? If I am right in thinking that a company might be constituted with articles providing for this result, I can see no reason why the article providing for the issue of shares on which no more than a specified sum was to be paid should not be binding in respect of shares issued on those terms upon all members of the company. Why should members who have become as much bound by the articles as if they had executed them under seal, in accordance with the provisions of which shares have been taken on the terms that no more than 10*s*. should be paid in respect of them, be allowed to say that, to adjust their rights and to diminish their loss, or

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Herschell.

even put money in their pockets, further payment should be required? It would be, I think, much more consonant with recognised principles to hold the members bound and the transaction valid, in so far as the statute does not invalidate it. Any other conclusion would lead in many cases to grievous injustice where companies and their members have acted in good faith, but under an erroneous view of the law. In the present case, for example, it may be that the original shares, or some of them, are still held by the vendor to the company, to whom they were allotted as fully paid up, so that a member who has come in when the affairs of the company were desperate would be compelled to find money to provide for a cash payment to the vendor whose business turned out so unprofitable. Or, again, the shares may have been bought by the present members for 10*s*. a share, and the contribution of the holder of discount shares might more than recoup this amount. If the statute compels such results, we must not shrink from construing it correctly because this construction would lead to injustice. But if, without violating any legal principle, this can be avoided I think it ought to be done.

I may here observe that the clause of the articles which provides for the distribution of the surplus assets, and which requires that they shall be distributed so that the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them, was "to be without prejudice to the rights of the holders of shares issued upon special conditions."

I do not think that if the holders of discount shares are right in their present contention it follows that they would be entitled to be recouped out of the contributions of the other members the sums they have been compelled to pay for the discharge of the debts of the company. It is one thing to say that they are not bound to make a contribution merely for the benefit of the other members, that these possess no rights for the adjustment of which this is necessary, and another thing to imply an obligation on the part of the other members to make good any sums which the discount shareholders are, under the provisions of the statute, held bound to pay.

I do not feel pressed by the difficulties which it is suggested would flow from such a conclusion. It is a part of the social contract that the holder of a discount share should be entitled to participate in the assets of the company equally with shareholders who have fully paid up their shares, or become the holders of fully paid up shares. No shareholder can be compelled to pay more than the nominal amount of his share. But if at the time of the winding-up there be shares with a liability upon them, I cannot see why this liability should not be enforced to the full before the holders of these shares are entitled to participate equally in the distribution of surplus assets with those whose shares are, by the contract inter socios, to be treated as fully paid up. I cannot see that wrong will in any case be done to the shareholders other than the discount shareholders by the conclusion which I think logically sound. On the contrary, they might in certain cases even obtain an advantage for which they did not bargain.

I have hitherto confined my consideration to the discount shares, but all that I have said is, in my opinion, equally applicable to the bonus shares allotted to the subscribers for debentures. The allotment of such shares was part of the consideration of a loan to the company without which it would not have been made. Granting that in spite of this the holders are liable to contribute up to the amount of their shares for payment of the debts of the company, why should the other members be able to say that in order to adjust their rights as against these holders they should be compelled to make a further contribution?

I do not think that the preference shares issued as part of the consideration for the extinction of a debt of 13,402*l.*, can stand on a different footing. The directors had power under art. 4 to issue shares on these terms so far as the members could give it.

I think the judgment ought to be reversed.

Lord Macnaghten (after stating the facts):—The appellant, having duly paid the former calls, objects to the call now proposed on the ground that the shares standing in his

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Macnaghten.

name ought, by reason of the terms on which they were issued, to be treated as fully paid up to the extent not required for the payment of the company's debts and the costs and expenses of liquidation.

Whatever colour there may be for the appellant's contention in regard to his bonus and discount shares, there can be none, as it seems to me, in regard to his preference shares. They were not issued at a discount or by way of bonus. They were meant to be paid for in full in the ordinary way. But it was held by the learned judge that the consideration for which they were issued could not be treated as payment in cash, and that if it amounted to payment in any other form there was no registered contract to satisfy the requirements of the Act of 1867.

As regards the other shares it would perhaps have been more regular, and certainly it would have raised the question more plainly, if, instead of merely resisting the liquidator's summons, the appellant had made a substantive application asking the Court to rectify the list of contributories, or to make a declaration in his favour controlling its effect. Anyhow, the burthen lies with him. It is for him to shew that he has some equity clear enough and strong enough to relieve him from the ordinary consequences of his present position.

In the present state of things the application of the liquidator would seem to be a matter of course. It stands unchallenged on the records of the Court that some of the contributories have discharged in full their obligation to the company, while others have not done so. Why should not those who have paid more than their proportionate share of the general liability call upon those who are behindhand for contribution? It was said that the statute does not in terms provide that calls are to be made for the purpose of equalising the payments of members. That is quite true. The right to contribution does not depend on statute any more than it depends on contract. It is one of the plainest of equities, and although no doubt, in the case of limited companies where there are successive issues of capital, it may sometimes operate unexpectedly, and perhaps even harshly, on shareholders who come in at the very last moment,

the apparent hardship is really due to their own want of prudence.

Why, then, I ask, is the appellant to be relieved from the obligation of contributing his proportionate share of the losses of the undertaking? It was said that there was a "social contract," to which effect ought to be given now that the rights of creditors are out of the way. There, as it seems to me, lies the fallacy. How was the supposed contract made? Who gave the requisite authority for making it? Not the company, nor yet the shareholders. It is beyond the powers of a limited company to limit the liability of shareholders in a manner inconsistent with the conditions of the memorandum of association. The directors, therefore, had no authority from the company to issue shares at a discount, or on any terms relieving the shareholder from liability to pay in full. The shareholders had no power to authorize the directors to do on behalf of the company that which the company itself could not authorize them to do. The articles of association no doubt empower the directors to issue shares on such terms as they think fit; but that must mean, of course, on such terms as they think fit consistently with the provisions of the Companies Acts. The articles in express terms purport to authorize the directors to issue shares at a discount. That provision, however, is in contravention of the statute of 1862, and simply void; neither the company nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind. If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but who, in fact, gave them none? The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Macnaghten.

the names of the discount shareholders on the register; they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

Your Lordships were reminded that there was a judicial decision, for several years unreversed, which sanctioned the issue of shares at a discount. That is so. But it must be remembered that at the time when that decision was pronounced the current of authority had drifted somewhat away from the true principles of the Act of 1862. As soon as those principles were reasserted and re-established by your Lordships' House in *Trevor* v. *Whitworth* (1), it became clear again—clear, I think, beyond argument—that the shares of a company limited by shares could not be issued at a discount. The issue of shares at a discount is just as much an unauthorized reduction of capital as the purchase by a company of its own shares. And so it was held by the Court of Appeal in the *Almada and Tirito Co. Case* (2), and afterwards in this House in the *Ooregum Case*. (3) Speaking for myself, I must say I do not think that the *Ooregum Case* (3) laid down any new law. It was no new departure. Your Lordships will find the governing principle stated as plainly and as emphatically in *Dent's Case* (4) in 1873 by Selborne L.C. as it was by any of the noble and learned Lords who took part in the *Ooregum Case* (3) in 1892.

Holding, as your Lordships afterwards held in the *Ooregum Case* (3), that the memorandum of association of a limited company has the effect of prescribing as well as of limiting the liability of its members, Lord Selborne points out, as has been pointed out over and over again, that, with certain exceptions not material for the present purpose, clause 12 of the Act of 1862 forbids any alteration in the conditions contained in the memorandum. "It is," says his Lordship (5), "quite certain that, under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the

(1) (1887) 12 App. Cas. 409.
(2) 38 Ch. D. 415.
(3) [1892] A. C. 125.
(4) L. R. 8 Ch. 768.
(5) L. R. 8 Ch. at p. 776.

shareholders thereby prescribed—it is simply void." Nothing can be more to the point than that. So far the *Ooregum Case* (1) goes; but it was not, I think, meant to go further. And, indeed, several of the noble and learned Lords who took part in the judgment in that case guarded themselves against being supposed to determine or prejudice the present question. It may be that the principle on which the decisions in *Dent's Case* (2) and the *Ooregum Case* (1) proceed leaves little room for the appellant's contention. Still, if it could be shewn that the appellant has any equity to be relieved from further liability—if the Court could be "satisfied of the justice of the case," to use the words of the Act of 1862—I do not think the decision in the *Ooregum Case* (1) would be a fatal bar. Nor, with all deference to the view thrown out by the Court of Appeal in the case of the Weymouth and Channel Islands Steam Packet Company, would it be a sufficient objection that the contract, if there be a contract, was one with the company and not with the shareholders. If directors, being duly authorized in that behalf, invite persons to take shares on certain terms varying the rights of members inter se, acceptance of the invitation must, I think, establish a contractual relation between the members themselves. But really all the arguments urged on behalf of the appellant, however they may be presented—and they were presented in various ways—must go back to contract as the foundation and starting-point. It was said, and said truly, that the directors might have issued shares with a preferential right as regards capital in the event of winding-up, in which case the ordinary shareholders would have had no right to contribution; and then it was urged that to that extent, at any rate, effect should now be given to what was described as the intention of the parties. I could have understood that argument if I could have found a contract. It may well be that one party to a contract cannot escape from his obligations by pleading incapacity to perform them in full if the other party is willing to take something less than that which he bargained for. But if there is no contract, but only an agent acting without authority, I cannot see what equity there is to compel a

(1) [1892] A. C. 125. (2) L. R. 8 Ch. 768.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Macnaghten.

principal to submit to one set of conditions because his agent has attempted ineffectually to bind him to another and a different set; nor is the case of the party disappointed by reason of the agent's want of authority bettered by the circumstance that the relief he is seeking is not only different from but inconsistent with the position he would have occupied if the authority of the agent had been sufficient.

Some things were introduced into the discussion which are hardly matters of argument. It was said that if effect were to be given to the view of the Court of Appeal it would lead to great hardship in many cases. Perhaps it may. There is plenty of hardship in almost every case of winding-up. But I must say I cannot see any particular hardship in the present case. The appellant was warned in time, but he chose to disregard the warning. If a man will remain on dangerous ground after he has been told of the risk, I do not think he has much reason to blame the persons who invited him there, especially when those who gave the invitation did their best to set things right by giving warning in time. Then it was said that some of the members now claiming contribution may have bought their shares in the market for less than the price asked from the discount shareholders. But surely the owner of a thing, whether he has paid much or little for it, is entitled to all the rights attached to it. It was said, further, that some of the claimants were the very persons who sold to the company the property which has turned out such a disastrous bargain. Can your Lordships go into that matter? There is no evidence that the company gave too much for the property they bought. The failure of the company proves nothing. Is it not enough that the shares were in fact fully paid, and the honesty of the transaction is not impeached? These are small matters, and hardly, I think, worth noticing. But the question before the House is very serious and very important. It would be, I think, much to be regretted if your Lordships were compelled to yield to the arguments of the appellant. These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the

conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors —perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act. A limited company cannot, in matters within the conditions of its memorandum, go on leading, as it were, two lives, one strict and precise and regular, and the other a life of greater freedom and laxity, substituting the easier yoke of "social contract" for the rigour of statutory directions. The confusion would be hopeless. Take the present case as an example. The questions are comparatively simple when you get to a winding-up; but in the meantime, what is the position of a so-called discount shareholder? Can calls be made upon him? If so, can calls be made to develop the business, or only to meet the demands of creditors? Has he any right of recourse against the other shareholders? Then how about transfer? The directors could not allow these shares to be transferred on a certificate stating that they were fully paid, or they (see *Hirsche* v. *Sims* (1)) would be the only persons liable for the breach of trust in issuing them as fully paid. It is not necessary, I think, to pursue this point further. It seems to me that you would be met by practical difficulties at every turn if you were to accede to the view presented by the appellant.

I am of opinion that the judgment must be affirmed.

Lord Morris. My Lords, I am of opinion that this appeal should be dismissed.

I see nothing to limit the application of s. 25 of the Companies Act, 1867, to the case of a creditor and the company; it applies as much to a shareholder or sets of shareholders and the company. It is general in its terms, applying to all cases of the issue of shares. Any agreement or resolution of the company to issue shares on terms short of full payment was consequently illegal, and the liquidator is bound to bring the

(1) [1894] A. C. 654.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Morris.

appellant's shares to the same level of payment as the other shareholders by making a call for the purpose of such levelling up. This appears to me clear on the statute, and to be the principle decided in the *Ooregum Case*. (1)

I entirely agree with the full reasons for arriving at this result which my noble and learned friend Lord Davey is about to read, and which I have had the advantage of seeing.

LORD DAVEY (after stating the facts given above):—My Lords, calls have been made in the course of winding-up on the bonus and discount shares, the proceeds of which (it is assumed) are sufficient for the payment of the debts of the company and the costs of winding-up. The liquidator now proposes to call up the balance of 2*l.* 5*s.* per share on the bonus and discount shares, for the purpose of adjusting the rights of the contributories inter se.

The appellant disputes the right of the liquidator to make the call for that purpose, and contends that, as between him and the other shareholders, his shares should, by reason of the terms on which the same were issued, be treated as paid up to the extent not required for payment of debts or costs of winding-up. This contention has been rejected by Kekewich J. and the Court of Appeal, following the previous decision of the latter Court in the *Weymouth and Channel Islands Steam Packet Co.'s Case*. (2)

The appellant's case was argued with great ability by Mr. Swinfen Eady, and, as presented by him, it had not only an appearance of plausibility, but an attractive air of fairness and good faith. He argued that, as between themselves, the shareholders were bound to give effect to the contract upon which the appellant had become a shareholder, so far as they legally could do so, and although that contract could not have effect given to it as against creditors, there was no legal principle which should prevent the Court from giving effect to it in a question inter socios; and, further, that the rights of the contributories inter se must be determined with reference to that contract. A fuller consideration of the case since the

(1) [1892] A. C. 125. (2) [1891] 1 Ch. 66.

argument has satisfied me that we cannot accede to the appellant's contention consistently with what has been decided by this House in the *Ooregum Gold Mining Co's Case* (1) and the settled principles of law applicable to joint stock companies incorporated with limited liability. The question now before the House was, it is true, left open in the *Ooregum Case* (1), but the solution of it seems to me logically and necessarily to follow from what was decided in that case.

Let us ask, what is really meant by the issue of a share at a discount? It means that although less than the nominal amount, or even (as in the case of the bonus shares) nothing whatever, has been paid up on the share, it is to be treated for all purposes of the company, and to be placed on the same footing as regards the rights of the shareholders, as if it had been fully paid up in cash. The consequence as regards the distribution of surplus assets in case of a winding-up would seem to be that the discount shareholder would have the right—(*a*) if all the other shares were fully paid up, to participate in the surplus in proportion to his shares; or (*b*) if some of the other shares were not fully paid up, to require a call to be made upon them, and to have the proceeds of such call distributed as surplus assets, or (which is the same thing) to have the difference between the amount considered as paid up on the discount shares and the amount actually paid up on the cash shares paid to the discount shareholder before any distribution of the residue of the surplus assets. In the present case the appellant is resisting a call upon him, but the extent to which his argument must necessarily go in other conceivable cases should be considered. If the contract that no call shall be made upon the discount shareholders is valid as against shareholders, although not as against creditors, the result would also seem to be that the discount shareholder would be entitled to be recouped the calls which he had been obliged to pay contrary to the contract out of surplus assets before distribution, and then to participate pari passu in the ultimate residue (if any). If this be not so, the amount of calls which the holders of discount shares have to pay would depend on the promptness with which the liquidator might be able to

(1) [1892] A. C. 125.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Davey.

realize the assets and pay the debts out of them, instead of making a call. If there are surplus assets after payment of the debts it shews that to that extent calls were not required. Mr. Swinfen Eady, in answer to a question which I took the liberty to ask, said that the company might make calls on the discount shares while the company was a going concern. But why? If he had had the courage of his argument he would have replied "No," because the creditors have no rights whilst the company is a going concern except to sue the company, and the question is then entirely one inter socios. In short, the argument (in my judgment) must be that as between the shareholders the contract is that no calls shall be made on the shares in question.

Now let us see what was decided in the *Ooregum Case* (1), and what was the basis of the decision. It was in the first place held in this House that the capital mentioned in the memorandum was intended to be the real capital of the company, i.e., the capital represented by money or money's worth, and not merely the nominal capital for the purpose of fixing the proportionate rights of the members inter se. And it was further held that s. 8 of the Companies Act 1862, requiring the memorandum to contain the amount of the capital divided into shares of a fixed amount, combined with the statutory limitation of liability in s. 38 (*a*), is equivalent to a statutory requirement that such fixed amount shall be payable in money or money's worth. "It seems to me," says the Lord Chancellor, "that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement and by any expedient to arrange with the shareholders that they shall not be liable for the amount unpaid on their shares although the amount of those shares has been in accordance with the Act of Parliament fixed at a certain sum of money."

It is therefore in my opinion conclusively decided that the obligation to contribute to the assets of the company in one way or another the nominal amount of the shares is part of the

(1) [1892] A. C. 125.

statutory constitution of every joint stock company limited by shares embodied in its memorandum of association, and therefore not alterable by the company or by the unanimous consent of all the shareholders. It is a liability which the company cannot release or relieve the shareholder from. On the one hand there is the liability to pay; on the other hand there is the correlative right of every shareholder to insist on the due performance of the conditions of the memorandum.

It is familiar law that no article can be valid or binding upon the shareholders which is in conflict with the memorandum or with the general law. Nor does it admit of doubt that shareholders equally with creditors have the right to invoke the conditions contained in the memorandum and resist any infraction of them; and in fact until the winding-up takes place a creditor has no right to do so. That was the principle on which both the cases of *Hutton* v. *Scarborough Cliff Hotel Co.* (1) were decided. Doubts have been entertained as to the correctness of the decision in those cases, and it has been thought that the priority between existing shareholders and the holders of new share capital created under a power is one of those matters of internal management which if not expressly settled by the memorandum may be settled by the articles. Dissent from the decision in the second case of *Hutton* v. *Scarborough Cliff Hotel Co.* (1) has been expressed by one of your Lordships in this House, and it has recently not been followed in the Court of Appeal. In this case, however, there is no doubt after the decision in the *Ooregum Case* (2) that the obligation to pay up the amount of the shares flows from and is part of that which the Act requires to be stated in the memorandum, and the shareholders have a right to the performance of that condition.

The social contract is to be found not in the articles alone, but in the memorandum and articles, and as much in the former document as in the latter. Therefore in the ultimate adjustment of their rights inter se which takes place before the final dissolution of the company regard must be had to the primary obligation of every contributory to contribute the

(1) (A) 2 Dr. & Sm. 514; 4 D. J. & S. 672; (B) 2 Dr. & Sm. 521.
(2) [1892] A. C. 125.

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Davey.

amount of his share to the assets of the company, and according to the ordinary principle of equity the contributories have the right to have the adjustment made on the basis that all have satisfied or will satisfy their primary obligation to the company. I do not think that any article or regulation of the company which ignores that primary liability, or purports to provide for the adjustment of their rights on any other basis, could validly be made, because it would be inconsistent with the memorandum as interpreted by this House. This opinion, I should observe, is perfectly consistent with a regulation being made for priority to certain shareholders on the distribution of surplus assets when ascertained and got in. But no contributory can take or retain anything out of the surplus assets until he has satisfied his primary obligation either by payment of, or being debited in account with, the amount remaining unpaid on his shares.

If this be so, there is in my opinion an end of the appellant's case, because so much of art. 4 as purported to empower the directors to issue shares at a discount is ultra vires the company altogether, and everything purporting to have been done under it is a nullity as against both shareholders and creditors in a winding-up. Article 140 must be read as applying only to special conditions which the company could legally attach to shares. No shareholder can derive any right as against his co-shareholders, or to have assets distributed otherwise than in accordance with law, from an act of the directors or the company which is ultra vires.

But it is argued that the company might have done the same thing in another way ex. gr., if they had conferred on the bonus and discount shares a preference in distribution of capital which was within their powers.

My present impression is, that in the particular circumstances of this case such a provision would probably have worked out the same result, although by a different road, as issuing the shares at a discount, but liable to calls for payment of debts. But I have already shewn that in other perfectly conceivable circumstances the result would have been widely different, and the holders of the discount shares (if valid) might

be entitled not only to be preferentially recouped out of surplus assets the calls they had paid, but also to participate in any remaining assets, on the footing that their shares were paid up in full, or to have calls made upon other shareholders for the purpose of adjusting their rights, although they had not themselves in fact contributed towards the company's assets. I cannot therefore agree that the company could have done the same thing as issuing the shares at a discount inter socios in another way, and I think they could not. However, the company did not make the contract for attaching a priority to the shares. What the directors purported to do was to issue these shares free from liability for calls (altogether or beyond 10*s.* per share), and they no doubt believed they could do so, and intended to do so. It appears to me that it would be contrary to principle and unsound to split up a contract made alio intuitu, and convert it into a very different contract which the parties never thought they were making, because the contract as made cannot be carried into effect, but a similar result might in certain circumstances and to a limited extent be arrived at in a different way. Such a proceeding would not be giving effect to the contract, but making a new contract.

Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts. The parties interested in opposing the appellant seem to be the present holders of the original shares and of the new shares issued for cash. They may or may not be the same persons as were holders of shares at the time of the issue of the bonus and discount shares.

In the view that I take it is not necessary to decide the point; but I am of opinion, having regard to the language of s. 25 of the Act of 1867, that Mr. Swinfen Eady could not

H. L. (E.) 1897 WELTON v. SAFFERY. Lord Davey.

have succeeded according to any view of the law as regards those bonus and discount shares in respect of which no agreements have been filed.

There is a third class of shares mentioned in the case as preference shares. These shares were apparently issued as cash shares, and the contest has been whether they were in fact paid up. By an order of June 14, 1893, some of the appellant's preference shares were declared to be fully paid, others wholly unpaid, and one to be paid to the extent of 2*l.* 10*s.* There is no appeal against this order, and I fail to understand what question can now arise respecting these preference shares.

I am, therefore, of opinion that the appellant has failed to shew any special conditions attached to the issue of any of the three classes of shares held by him of which the Court can take cognizance, and the rights and interests of himself and his co-contributories must be determined and adjusted on the basis that the appellant as well as the other contributories have contributed or will contribute the full amount of their shares to the company's assets. The appeal should, in my opinion, be dismissed with costs.

Orders appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 8, 1897.

Solicitors for appellant: *Slaughter & May.*
Solicitor for respondent: *C. T. Whinney.*

[HOUSE OF LORDS.]

THE OWNERS OF THE STEAMSHIP "EDENBRIDGE" . . . . . } APPELLANTS;

AND

GREEN AND OTHERS, THE OWNERS OF THE STEAMSHIP "RUTLAND" . . } RESPONDENTS.

H. L. (E.)
1897
May 10.

THE "RUTLAND."

Admiralty—Collision—Compulsory Pilotage—"Ships trading from any Port in Great Britain" to Port North and East of Brest—Merchant Shipping Act 1894 *c.* 60 *s.* 625 *sub-s.* 3.

By the Merchant Shipping Act 1894 s. 625 sub-s. 3, "Ships trading from any port in Great Britain within the London district to any port in Europe north and east of Brest," are when not carrying passengers exempted from compulsory pilotage in the London district.

A British ship, laden with a cargo from the River Plate to Rotterdam and with cattle for London, discharged the cattle in London and proceeded with the cargo to Rotterdam:—

Held, that whilst the ship was proceeding from London to Rotterdam she was (though she took in no cargo in London) "trading" from London to Rotterdam within the meaning of the statute, and was therefore exempt from compulsory pilotage in the London district.

The decision of the Court of Appeal, [1896] P. 281, affirmed.

THE British steamship *Edenbridge* (of over 1000 tons) left the River Plate with a general cargo for Rotterdam, and with cattle and sheep for London, and carried no passengers. She proceeded to the Thames, went up to Deptford, there landed the cattle and sheep and cattle-men, turned round and proceeded with the cargo and the same crew to Rotterdam. On her way out from Deptford and while in charge of a Trinity House pilot she came into collision with the *Rutland* within the London district. This was the first time the *Edenbridge* had made this voyage. In an action by the appellants against the respondents a decree was by consent pronounced that both the *Edenbridge* and the *Rutland* were to blame for the collision, the pilot of the *Edenbridge* to be held responsible for her

H. L. (E.) 1897

OWNERS OF STEAMSHIP "EDENBRIDGE" v. GREEN.

navigation, but the question whether or not that pilot was employed by compulsion of law to be decided by the Court.

Sir Francis Jeune, considering himself bound by *Courtney* v. *Cole* (1), held that the employment of the pilot was not compulsory by law, and pronounced that the damage ought to be borne equally by the owners of the two ships. This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and A. L. Smith L.JJ.). (2) The only question on this appeal was whether the *Edenbridge* was at the time and place of the collision exempt from compulsory pilotage.

By s. 625 of the Merchant Shipping Act 1894, "The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this Part of this Act, be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; (that is to say) . . . . (3.) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. . . ."

May 7, 10. *Sir Walter Phillimore* and *F. Laing* for the appellants. The statutory exemption from compulsory pilotage applies only to ships "trading from a port in Great Britain" to one of the named ports. The *Edenbridge* was not "trading from" London to Rotterdam: she was trading from the River Plate to Rotterdam, and also from the River Plate to London, because she was carrying cargo to London and to Rotterdam; but as she did not take in cargo in London she was not trading from London to Rotterdam. If she had taken in cargo at London she would have been within the exemption. The statute does not say "trading ships sailing between" the named ports, but "ships trading from . . . . to . . . ." A ship does not trade from London to Rotterdam if she merely comes to London, there discharges some cargo and proceeds with the rest of the cargo and no fresh cargo to Rotterdam. "Trading" involves taking in cargo at the one port and carrying it to the

(1887) 19 Q. B. D. 447. (2) [1896] P. 281.

other: *Mersey Docks and Harbour Board* v. *Henderson*. (1) The Act of 1894 was passed in view of that decision. The Court of Appeal held "trading" equivalent to "sailing," but "sailing" is used elsewhere in the Act when it is intended. Nor is "trading" equivalent to "going": see the definition of "foreign-going ship" in s. 742. *Courtney* v. *Cole* (2) is distinguishable: it was decided upon the Merchant Shipping Act of 1854 s. 379 sub-s. 3 where the words "from any port in Great Britain" were omitted. The principle of the exemption is that the masters of small vessels trading between ports in the London district and the other named ports are supposed to be so familiarly acquainted with the route that it is not necessary to compel them to employ a pilot: see per Dr. Lushington in *The Agricola*. (3) No commercial man would speak of the *Edenbridge* as trading between London and Rotterdam. Compulsory pilotage being enacted generally as to the London district the onus of bringing this case within the exemption lies on the respondents.

Pyke Q.C. and *A. E. Nelson* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, I agree with the observation which has just been made by the learned counsel that this case depends upon the question what the statute means by a vessel "trading" between certain ports. For my own part I cannot adopt the view that you are entitled to change the participle into an adjective, and I do not think it would carry us to a right conclusion if you did. A "vessel trading" points to the particular act of trading, which is the matter that was in the mind of the Legislature.

I cannot help thinking that it is a very forced construction to say that you must minutely subdivide the act of trading into each particular thing that is being done, and apply it to each. The "needy knife-grinder" who goes all over the country is trading all the while, though he does not get knives to grind everywhere. A shopkeeper in London is trading as long as his

(1) (1888) 13 App. Cas. 595. (2) 19 Q. B. D. 447.
(3) 2 Wm. Rob. 10.

H. L. (E.) 1897

OWNERS OF STEAMSHIP "EDENBRIDGE" v. GREEN.

Lord Halsbury L.C.

shop is open, although at the particular moment of time to which you refer there may be no customer in his shop engaged in the act of barter. And so it appears to me that a vessel which is on a trading voyage generally is not the less trading because between A. and B., or any particular ports which you like to select in the course of that voyage, to which for some reason or another the vessel has gone in, she is not carrying goods. The word "trading" in itself appears to me to involve the idea that while there may be a voyage for trading when a vessel goes into a port and delivers goods and takes goods from there, it is equally true that a vessel may be still trading when she goes into a port without delivering goods in it or taking goods from it. The truth is that Sir Walter Phillimore wants to introduce into the language of the statute that the word "trading" must mean carrying goods from each port of departure to each port of arrival. It appears to me that there is no foundation for any such contention, and I move your Lordships that the appeal be dismissed with costs.

LORD WATSON. My Lords, the expressions used in sub-s. 3 of s. 625 to define the exemption from compulsory pilotage are very capable of having their meaning controlled and modified by the context in which they occur. It is therefore legitimate and necessary for the purposes of this appeal to examine the context of the Act of 1894; but in my opinion it is anything but a profitable task to inquire what meaning may have been judicially attached to these expressions occurring in other statutes and in different contexts.

I can find nothing in the Act of 1894 which requires that the words of sub-s. 3 shall be construed in any other than what I venture to term their ordinary and natural import; and, when so construed, I think they include every ship which has left the port of London and is on her way to Brest, or to any of the other ports which are named in the statute, in pursuit of a commercial adventure.

LORD HERSCHELL. My Lords, I am of the same opinion. This vessel arrived at the port of London on a trading

adventure. She there discharged part of her cargo. She left the port of London on a voyage to a Continental port. That voyage was in the course of being pursued for the purpose of a trading adventure. Under these circumstances she was in my opinion "trading" from the port of London to that Continental port within the meaning of the exemption which is now in question.

LORDS MACNAGHTEN, MORRIS, and DAVEY concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 10, 1897.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

WELLS AND ANOTHER (PAUPERS) . . . APPELLANTS;

AND

THE OWNERS OF THE GAS FLOAT WHITTON No. 2 . . . . . RESPONDENTS.

THE GAS FLOAT WHITTON No. 2.

Admiralty—Salvage—Jurisdiction—County Court—Gas Float—Beacon or Buoy—Merchant Shipping Act 1854 *c.* 104 *ss.* 458, 476—*County Courts Admiralty Jurisdiction Act* 1868 *c.* 71 *s.* 3.

The jurisdiction of the Admiralty over salvage does not extend to all property exposed to perils of the sea and used to assist navigation.

A gas float, shaped like a boat, but neither intended nor fitted to be navigated, was moored in tidal waters to give light to vessels and went adrift in a storm:—

Held, that not being a ship or part of a ship or of her apparel or cargo the structure was not the subject of a claim for salvage within the Admiralty jurisdiction.

The decision of the Court of Appeal, [1896] P. 42, affirmed.

THE *Gas Float Whitton* No. 2 was 50 feet long and 20 feet broad: its hull somewhat like that of a ship or boat, its two

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2.

ends shaped like the bow of a vessel: it was made of iron, and had no oars, mast, stern-post, fore-post or rudder: a cylinder containing gas occupied the interior: the gas by its own elasticity supplied for about six weeks the light which was rigged on a pyramid of wood about 50 feet high. No one was stationed on it. There was evidence that it could not be used for navigation, and that it was next to impossible to tow it. Its value was about 600*l*. It was moored in the Humber as a beacon to warn vessels off a shoal. It got adrift in December 1894 in a moderate gale and the plaintiffs helped to secure it till a Trinity House yacht took charge. The plaintiffs brought an action in rem for salvage services in the county court at Hull, and the learned judge, holding that the gas float was a ship or vessel and a wreck within the Merchant Shipping Act 1894 and the County Courts Admiralty Jurisdiction Act 1868, awarded the plaintiffs 15*l*. This decision was affirmed by the Admiralty Division, Sir F. Jeune and Barnes J., who held that it was neither a ship nor a vessel nor a wreck, but that there was jurisdiction to award salvage in respect of a structure used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea. (1) These decisions were reversed by the Court of Appeal, Lord Esher M.R., Lopes and Kay L.JJ., who held that there was no jurisdiction on any ground and pronounced against the plaintiffs' claim. (2) The plaintiffs brought the present appeal.

March 1, 2, 8. *Pyke Q.C.* and *Arthur Pritchard* for the appellants. There was jurisdiction to award salvage on two grounds; first, the gas float was "a ship or vessel" within the meaning of the Merchant Shipping Acts and the County Courts Admiralty Jurisdiction Act; and secondly, it was property used in connection with navigation and exposed to maritime peril. As to the first ground the Act of 1840 (3 & 4 Vict. c. 65) s. 6, extended the jurisdiction of the Court of Admiralty in salvage cases to the body of a county, but only in the case of a "ship or sea-going vessel." The Act of 1846 (9 & 10 Vict. c. 99) s. 40, removed this restriction and extended the jurisdiction to all

(1) [1895] P. 301. (2) [1896] P. 42.

kinds of property whether on the high seas or within the body of a county. The Merchant Shipping Act 1854 c. 104 s. 476 extended the jurisdiction to all property wherever found. By the County Courts Admiralty Jurisdiction Act 1868 c. 71 s. 3, under which this case comes, county courts having Admiralty jurisdiction have jurisdiction in claims for salvage within certain money limits.

The gas float was held by the Court of Appeal not to be a ship. But it was exposed to the same perils as a ship, saved by the same exertions, and in its then state was a great danger to navigation. It was navigable in the sense that it could only be got to its place by navigation, and it was a vessel carrying cargo or goods, namely gas. By the Merchant Shipping Act 1854 s. 2, "ship shall include every description of vessel used in navigation not propelled by oars." Vessel means "any vehicle in which men or goods are carried on the water": Latham's Dict. In *The Mac* (1) the Court of Appeal took a much broader view, and held that a hopper-barge without motive power of her own was a ship, and Brett J. said she was "used for navigation," as she dredged mud. So is this gas float: she carries gas to where it is wanted. The subjects of salvage are however not confined to ships and cargoes, but extend to any maritime property, and in fact to any property in peril which has for its object the being committed to the sea. The definitions of salvage given in the older authorities make it turn, not upon the nature of the property saved, but upon the nature of the services rendered: *H.M.S. Thetis* (2); *Cox* v. *May* (3), per Lord Ellenborough. In *Five Steel Barges* (4) it is treated as a legal liability arising "out of the fact that property has been saved." And see per Story J. in *The Schooner Emulous* (5); Marvin's Law of Wreck and Salvage, p. 105; Williams and Bruce's Admiralty Practice, 2nd ed. pp. 114, 133, and the cases there cited. In the note (*n*) to p. 133 the learned authors say: "it is submitted that the Admiralty Court, by virtue of its original jurisdiction, may award salvage for services

(1) (1882) 7 P. D. 126.
(2) (1833) 3 Hagg. Adm. at p. 48.
(3) (1815) 4 M. & S. at p. 159.
(4) (1890) 15 P. D. at p. 146.
(5) (1832) 1 Sumner, 207, 210.

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2.

rendered to any property in danger of being lost at sea." And see Edwards, Admiralty Jurisdiction, p. 189, and Kennedy on Civil Salvage, p. 2; 1 Parsons' Marine Insurance, p. 604. In Chitty's Pleading, 5th ed. vol. ii. p. 68, is a precedent of a declaration at common law for salvage of an anchor and cable, not alleging that they came off a ship. At common law without express contract an agreement is implied to pay for salvage services: *Newman* v. *Walters* (1); and there is no reason for restricting this right to ship, wreck, &c.; in principle it must extend to all property exposed to sea peril. The lien to which a salvor is entitled till a proper compensation is made to him for his trouble extends apparently to all goods preserved: Abbott on Shipping, 13th ed. p. 717. "By the law of the Admiralty of the Cinque Ports during the fifteenth and sixteenth centuries the finder or salvor of all things in the sea was entitled to a half thereof. There is no reason to think that the law of the High Court was different; but there is not much evidence upon that point": Selden Society; Select Pleas in the Court of Admiralty, vol. ii., ed. Marsden, p. xxv.

The patent of a Vice-Admiral of the coast gave him jurisdiction to inquire concerning "Flotzon, Jetzon, Lagon . . . . and of the goods of all others taken as derelict . . . . and of all other casualties . . . . upon or by the sea and the shores . . . .": Sir Sherston Baker's Office of Vice-Admiral of the Coast, p. 55; and see a precedent, date 1550, in a MS. Book kept in the Admiralty Registry; also Stuart Moore's History of the Foreshore, p. 161, citing a writ to the Prior of Wymondham.

The origin of salvage was derived from the civil law: *The Calypso*. (2) By the Customs of the Sea, embodied in the Consolato del Mare (a work of high authority; see 3 Kent, Com. 10) he who found anything—not only merchandise but everything—at sea was entitled to a share: Twiss's Black Book of Admiralty, vol. iii. p. lix.; c. 115, p. 223; c. 207, p. 439; Pardessus, Collection de Lois Maritimes, vol. v. p. 243; Laws of Oleron, art. 43, in Sea Laws, Ancient and Modern, 3rd ed. p. 169. Out of these laws and customs came the right

(1) (1804) 3 B. & P. 612. (2) (1828) 2 Hagg. Adm. at p. 218.

of salvage, or compensation for the rescue of property—any kind of property—from maritime peril: Edwards, Admiralty Jurisdiction, 1847, pp. 184, 189, 190.

Arthur Young's Digest of Salvage Awards, 1837 to 1860, refers to awards made by Dr. Lushington in the Court of Admiralty in several cases analogous to the present; viz. No. 370, July 16, 1841, a hopper employed to carry mud but not goods, with a rudder but no motive power of her own; No. 371, same date, a lighter with a diving-bell and crane; No. 561, April 21, 1849, a raft of timber which broke loose while being towed into Hartlepool; No. 632, February 13, 1860, a steam dredger in Erith Reach. These cases are not reported except in the *Shipping Gazette* for the above dates. 3 Pritchard's Admiralty Digest, tit. Salvage, No. 1139, p. 2078, 3rd ed. cites *The Owners of a Caisson*; the caisson was 64 feet long and 20 feet wide and was used to close the entrance to dry docks: Sir R. Phillimore, May 12, 1876, awarded salvage, treating it not as ship or cargo but as property in peril, as appears from a shorthand note of his judgment. Salvage was awarded in *The Cleopatra* (1), which was built "like a ship's boiler with a bridge in the middle," for the sole purpose of carrying Cleopatra's Needle to England. In *Raft of Timber* (2) salvage was refused in respect of a raft within the body of a county, but on the ground that the raft was not a "ship or sea-going vessel" within the Admiralty Jurisdiction Act 1840 c. 65. See also *Nicholson* v. *Chapman* (3), where the judgment turned on the locality, not on the nature of the property. In *Hartfort* v. *Jones* (4) Holt C.J. said the defendants were entitled at common law to detain for salvage goods which they had saved from a fire in a ship.

In the United States salvage has been granted in respect of several articles of property other than ships, vessels, or cargo: e.g. rafts in *A Raft of Spars* (5) and *Fifty Thousand Feet of Timber* (6); ferry boats: *Steamboat Cheeseman* v. *Two Ferry Boats* (7); a floating elevator without means of propulsion:

(1) (1878) 3 P. D. 145.
(2) (1844) 2 Wm. Rob. 251.
(3) (1793) 2 H. Bl. 254, 257.
(4) (1698) 1 Ld. Raym. 393.
(5) (1848) 1 Abbott Adm. 291.
(6) (1871) 2 Lowell's Judgments, 64.
(7) (1870) 2 Bond, 363, 372.

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2.

The Floating Elevator Hezekiah Baldwin (1); two grain elevators: *The Rialto* (2); a raft in a harbour: *Bywater* v. *A Raft of Piles* (3); a floating bath-house: *The Public Bath No.* 13. (4) In *The Pioneer* (5) a steam dredge with no motive power of her own was held to be a vessel. In *Cope* v. *Vallette Dry Dock Co.* (6), relied on by Lord Esher M.R., a floating dry dock permanently moored was held not to be the subject of salvage, but it was of the nature of a fixture attached to the realty. The judgment of the Supreme Court takes a very narrow view of the Admiralty jurisdiction in salvage cases. It is impossible to suppose that if in early times there had been floating beacons the Admiralty would have declined jurisdiction over property of such value and importance to navigation. There is no actual precedent only because the thing did not exist.

Sir Walter Phillimore (*F. Laing* with him) for the respondents was informed that their Lordships did not desire to hear him on the question whether the gas float was a ship, or vessel or boat.

There is no English authority for the proposition that all property exposed to sea peril and connected with or used for the purpose of assisting navigation is the subject of salvage. No decision or dictum in favour of it has been cited. Nor is there any reason for extending the jurisdiction of the Admiralty to such a length. It would include all buoys and beacons, and as most of these are left unguarded the temptation to cut them adrift would be great and would lead to great expense and inconvenience. It would not be for the benefit of navigation that the finders should have a lien and the right of detention. Jurisdiction (as clearly shewn in the judgment of Lord Esher M.R.) has never been claimed by the Admiralty except over ship, apparel, and cargo and freight. Several of the cases cited by the appellants (such as the *Caisson*) are decisions as to cargo towed. Rafts of timber may be treated either as navi-

(1) (1876) 8 Benedict, 556.
(2) (1882) 15 Fed. Rep. 124.
(3) (1890) 42 Fed. Rep. 917.
(4) (1894) 61 Fed. Rep. 692.
(5) (1886) 30 Fed. Rep. 206.
(6) (1883, 1887) 16 Fed. Rep. 924; affirmed in Sup. Ct. 12 Davis, 625.

gable themselves or as cargo towed. The Act of 1846 (9 & 10 Vict. c. 99) deals with wreck and salvage, and with all goods found at sea (ss. 5, 11, 13, 19), but gives no colour to the appellants' contention. The Merchant Shipping Act 1894 c. 60 part xi. deals with lighthouses, buoys and beacons, but not as subjects of salvage. [He also referred to *European and Australian Royal Mail Co.* v. *Peninsular and Oriental Steam Navigation Co.* (1); *The Willem III.* (2); 1 Park on Insurance 8th ed. p. 327; Marvin's Wreck and Salvage, ss. 122, 123.]

Pyke Q.C. in reply.

The House took time for consideration.

May 24. LORD HERSCHELL (after stating the facts). My Lords, it is not in dispute that if, as the learned county court judge thought, the gas float can be properly regarded as a ship or vessel, his decision was right. That a ship or vessel, with her apparel and cargo, and flotsam, jetsam and lagan, which have formed part of one or other of these, are subjects of salvage, is clear law. But the Admiralty Division, equally with the Court of Appeal, thought the float could not be regarded as a ship or vessel. I agree with them. It was not constructed for the purpose of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound.

It was, however, argued that, even if the float be not a ship or vessel, the award of salvage can nevertheless be supported, inasmuch as the Admiralty Court has jurisdiction to award salvage in respect of every object, no matter what, which, being in peril at sea (or, since the extension of Admiralty jurisdiction in waters within the body of a county), has been saved from that peril.

Not a single decision, not even a dictum, of any English judge was cited to your Lordships as an authority for this wide view of the Admiralty jurisdiction. And it does not obtain any substantial support from the works of lawyers of recognised

(1) (1866) 14 W. R. 843. (2) (1871) L. R. 3 A. & E. 487.

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2. Lord Herschell.

authority, who have defined what is meant by "salvage" in maritime law. The few expressions which lend some colour to it have reference to certain American decisions. Indeed, it is on these that reliance is chiefly placed. Moreover, so far as the English statutes which have been referred to throw any light on the matter, in my opinion they not only do not favour the view contended for, but, on the contrary, seem to me to indicate that the Legislature regarded salvage as confined to ship apparel and cargo, or what had formed part of these, and to freight which was being earned by carriage of the cargo.

I turn now to the American cases, on which so much reliance has been placed. Though they are not authorities in our courts, the opinions and reasoning of the learned judges of courts in the United States have always been regarded with respectful consideration, and have often afforded valuable assistance. The case of *Cope* v. *Vallette Dry Dock Co.* (1) is a weighty authority against the proposition that everything found in the sea or in a river, in a state of peril, and saved therefrom, whether it has belonged to or been in a ship or not, is a subject-matter for salvage. That was the case of a dry dock moored to the bank of the River Mississippi and kept afloat thereon, which broke loose from its moorings. It was held that the services rendered to it were not salvage services. The Supreme Court, in delivering judgment, said that there had been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. They pointed out that when they had belonged to a ship or vessel as part of its furniture or cargo, they clearly came under the head of wreck, flotsam, jetsam, lagan, or derelict, and added, "but where they have no connection with a ship or vessel, some authorities are against the claim and others are in favour of it." Where authorities are thus in conflict it is obvious that they can have little weight.

Some of the cases relied on related to the rescue of things which, having been in tow of vessels, had broken loose and were in peril. Where goods are being towed from place to place, although they are not, strictly speaking, cargo, they yet

(1) 12 Davis, 625.

partake of its character and are closely analogous to it. They are being transported from place to place by a vessel. Their transport is a maritime adventure of precisely the same nature as the carriage of goods in the body of a ship. All the grounds of expediency in which the law of salvage is said to have had its origin would seem to apply to the one case as much as to the other. It may be, then, that in salvage law a broad and liberal construction should be extended to the word "cargo," so as to embrace goods in course of being transported by a vessel though not inside it. I desire to reserve my opinion on the point, in case it should hereafter be necessary to decide it. In the present case it is quite unnecessary.

Reliance was also placed on cases in which salvage had been allowed for services rendered to rafts of timber which were adrift. Such a case presents greater difficulty than the class just alluded to. But here again it must be remembered that rafts are frequently so constructed as to be in a sense navigated: they are capable of being and are steered. They often have crews resident on board; they are used for the transport, from place to place, by water, of the timber of which they consist, and sometimes of timber placed upon them. Whether these considerations would suffice to support the decision that salvage may be awarded in respect of services rendered to them or not, it is obvious that they are quite foreign to the case which has now to be dealt with by your Lordships; and it is only on such considerations, if at all, that the decisions can, in my opinion, be supported. I agree entirely with the Court of Appeal that the broad proposition contended for by the appellants is not law.

The learned judges in the Admiralty Division based their judgment on the ground that no reasonable distinction could be drawn between a ship and a structure moored in the sea or in a river to direct the course of ships, that both were necessarily exposed to sea peril, and that it was in the interests of navigation and commerce that beacons should be preserved from destruction. But if the Admiralty jurisdiction has been hitherto confined to the salvage of ship and cargo, or that which has formed part of one of them, I do not think the extension of it to a floating beacon can be justified merely

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2. Lord Herschell.

because it is property connected with navigation; and I think it would not be easy to define the limits of the jurisdiction if it were so extended. All buoys, every object intended to assist the navigation of vessels and guard them from danger, would, if exposed to perils of waters, be, I suppose, equally the subject of salvage claims. Would the lights which are found on piers and landing-stages be in the same category? And in that case must the claim be confined to the light or beacon, or would it extend to the whole structure on which it is erected, or of which it not infrequently forms part? Apart from this difficulty, however, I think it is enough to say that, in my judgment, it would not be right by judicial decision to add to the subjects to which the doctrine of salvage has hitherto been confined by the maritime law of this country.

I think the judgment appealed from should be affirmed.

LORD WATSON. My Lords, from a pecuniary point of view this case is a very small one; but it is of some importance in this respect, that it concerns the limits of Admiralty jurisdiction, and, in particular, the nature of those articles which can be properly made the subject of a claim of salvage attended with a maritime lien. It has the further merit of having been discussed and decided, with much legal learning, by no less than three Courts; and, in indicating the conclusion at which I have arrived, I do not find it necessary to refer in detail to the authorities, all of which are noticed in the judgments under review.

I think it was rightly assumed in the Courts below that the law which must determine what are the proper subjects of maritime salvage is to be sought in the decisions and practice of the Admiralty Courts of England, and in the statutes which from time to time have been passed by the Legislature for the purpose, mainly, of protecting ships and cargoes and their wreck against depredation.

The learned judge of the Yorkshire County Court, before which the action was originally brought, gave judgment for the appellants, the alleged salvors of the *Gas Float Whitton* No. 2, against its owners, the respondents, who are the

Corporation of the Trinity House of Kingston-upon-Hull. His decision was based upon the ground that the *Gas Float Whitton*, when in ordinary use, was a vessel or ship, and had become a wreck within the meaning of the rule of maritime salvage; and, had I been able to acquiesce in that view, which found no favour with the judges, either of the Admiralty Divisional Court or of the Court of Appeal, I should have been of opinion that your Lordships ought to revert to the order of the county court.

The reasons assigned for the judgment of the Divisional Court of Admiralty, consisting of the President of the Probate Division and Gorell Barnes J., were delivered by the President. Their Lordships affirmed the judgment appealed from, but on a new and different ground. In the Appeal Court, consisting of the Master of the Rolls, with Kay and Lopes L.JJ., the decisions of the Courts below were unanimously reversed, the opinion of the Court being delivered by Lord Esher M.R., with the concurrence of both Lords Justices.

Shortly stated, the judgment of Lord Esher M.R. is to the effect that there are no proper subjects of a maritime claim for salvage other than vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting on the ocean, or cast ashore. In that view the learned judges of the Admiralty Court concurred to this extent, that all these things are proper subjects of maritime salvage; but they held that the jurisdiction of the Admiralty is not limited so closely to a ship and her cargo "as to exclude a structure used in connection with navigation, and exposed in the ordinary course of its use to the perils of the sea."

Both these Courts were of opinion that *Gas Float Whitton* No. 2 was in no sense a vessel or a ship, and that it was not meant to be used, and in fact was not used, for the purpose of being navigated; and that it was in reality nothing more than a lighted buoy, moored in such a position as to give notice of danger, or to direct the course of navigable vessels. But, as already indicated, they differed as to the limit of the class of things which can be competently made the subjects of maritime

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2. Lord Watson.

salvage; with this result, that whilst the Admiralty Court allowed the appellants' claim because the gas float, though not a ship, was of a nautical character and exposed to sea peril, the Court of Appeal reversed the decrees which they had obtained, and dismissed their suit.

I am unable to concur in the view which was taken by the Court of first instance in regard to the true character of the *Gas Float Whitton* No. 2. It is used for purposes connected with navigation in the same sense as a lighthouse, or as a buoy, whether used as a beacon or for mooring a ship; but it appears to me to be wholly unfit for the purpose of being navigated as a vessel, and that it never was used, or intended to be used, for any such purpose. After considering all the authorities to which we were referred in the course of the able argument for the appellants, I am satisfied that the subjects of maritime salvage have been correctly defined in the clear and exhaustive judgment delivered by Lord Esher M.R. on behalf of the Court of Appeal. It was due to the great authority of the judges of the Admiralty Court that I should also consider the extension of the rule to that class of subjects which is explained in the opinion of the President, and was given effect to in their judgment. In that judgment the President does not refer to any cases or even dicta in support of the view which he suggests, and none were cited by counsel for the appellants. In the absence of definite authority upon the point, there does not appear to me to be any such analogy between the case of a ship destined for and engaged in navigation and a buoy, whether carrying a light or not, as would be sufficient to warrant the extension of the old and well-known maritime rule of salvage to articles of the latter description.

I am therefore of opinion that the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

I do not think it is possible usefully to add anything to the very able and exhaustive judgment of the Master of the Rolls. I agree in thinking that this gas float, though fashioned in the form of a ship and capable of being moved on the face of the

water, is not a "ship or vessel" in the sense in which the Merchant Shipping Act uses those terms, or indeed in any fair sense of the words. I do not, therefore, think that the appellants are entitled to salvage on the ground that the thing which they claim to have rescued is a "ship or vessel." The suggestion that salvage extends to all goods found in peril at sea, however they may have got there, is, I think, satisfactorily disposed of by the judgment of the Master of the Rolls.

There was one point on which I confess I felt some doubt during part of the argument. It was urged that though this gas float may not be a ship, and that though it may be that everything found in peril at sea is not the subject of salvage as a matter of course and under all circumstances, yet floating beacons are so intimately connected with navigation and so essential for the safety of shipping that it would be a narrow view to hold that a floating beacon cannot be the subject of salvage. It was said that it was impossible to suppose that if such a case as this had occurred in former times the Court of Admiralty would have declined jurisdiction merely because there was no instance of the sort to be found in the books. "It is," as the learned President says, "certainly in the interests of navigation and commerce that beacons, valuable in themselves and for their utility, should be preserved from destruction." There would be much force in the appellants' argument if it were clear that the proposed extension of the doctrine of salvage would conduce to the preservation of beacons. But these beacons are for the most part, if not always, left unguarded—they are easily set adrift. And the hope of earning reward by the restoration of lost property is not perhaps the best preservative against loss. Then, too, one must bear in mind the inconveniences which might arise from the legal rights of salvors in regard to detention of property when that property is the subject of salvage.

On the whole, therefore, I cannot agree that the proposed extension would be to the public advantage or convenience. And I think the remuneration for such assistance as the appellants have undoubtedly rendered is best left to those who have the care of the service on behalf of the public, and who must

H. L. (E.) 1897 WELLS v. OWNERS OF GAS FLOAT WHITTON No. 2.

know how to avoid the parsimony which might discourage meritorious exertions and that excessive liberality which might suggest or tend to create occasion for them.

I agree that the appeal must be dismissed.

LORD MORRIS. My Lords, I am of the same opinion.

Order appealed from affirmed and appeal dismissed.

Lords' Journals, May 24, 1897.

Solicitors for appellants: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for E. S. Wilson & Sons, Hull.*

[PRIVY COUNCIL.]

"MARY" TUG COMPANY, LIMITED . PLAINTIFFS;

AND

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED . . . . . } DEFENDANTS.

J. C.* 1897 *Feb.* 23; *March* 20.

THE "MEANATCHY."

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Collision at Anchor—Duty of Colliding Vessel—Duty at Anchor—Onus probandi.

When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, the onus is on her to justify her conduct. She cannot be excused when it is shewn that she had not a sufficient look-out. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, and to do everything in his power to avert or minimize a collision. If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, and it must be shewn that any alternative course would have prevented or mitigated the collision.

APPEAL from a decree of the Recorder of Rangoon sitting in Admiralty (Jan. 8, 1896), in a cause of collision.

The facts are stated in the judgment of their Lordships.

The Recorder pronounced the tug *Mary* to blame for the collision, and dismissed the appellants' action with costs, and he further pronounced in favour of the respondents' counter-claim, for which he gave judgment with costs. He found that the tug and the pilot brig were originally from 400 to 500 yards apart, the latter being ahead of the former, and he was advised as a matter of seamanship and found as a fact that in this position the master of the respondents' vessel was justified in navigating his vessel on a course to round under the stern of the pilot brig. He further found that by reason of the drifting

* *Present:* LORD WATSON, LORD DAVEY, SIR RICHARD COUCH, and SIR FRANCIS JEUNE.

J. C. 1897 "MARY" TUG COMPANY v. BRITISH INDIA STEAM NAVIGATION COMPANY. THE "MEANATCHY."

of the pilot vessel, of which the master of the *Meanatchy* could not be aware, he was brought into the position in which he was unable to avoid the collision. He found as a fact that there was no proper look-out on board the tug *Mary*, and that, as a matter of seamanship, the collision might have been avoided, or the damage reduced, had there been such look-out, or a properly qualified officer in charge. He found as a fact that the master of the tug gave the order to heave up chain, and was advised as a matter of seamanship and found as a fact that such order was an improper one, and that the chain should have been slacked away.

Joseph Walton, Q.C., and *Butler Aspinall*, for the appellants.
Sir W. Phillimore, Q.C., and *Batten*, for the respondents.

1897 *March* 20.

The judgment of their Lordships was delivered by

SIR FRANCIS JEUNE. This is an appeal from the Court of the Recorder of Rangoon, sitting as a Colonial Court of Admiralty, in an action between the "Mary" Tug Company, Limited, as owners of the tug *Mary*, and the British India Steam Navigation Company, Limited, as owners of the S.S. *Meanatchy*. The appellants claimed, and the respondents counter-claimed, in respect of a collision which took place between the *Mary* and the *Meanatchy* at the entrance of the Rangoon River on the night of February 8, 1895.

The *Mary* was lying at anchor heading to the flood tide, which was running with a force which is differently estimated by the witnesses, but which was certainly considerable. A pilot brig, the *Samson*, was lying also at anchor in a position which the learned Recorder considered was ahead of the tug, and at a distance of between 400 to 500 yards from her. The *Meanatchy* was coming up the Rangoon River, and sighted first the pilot brig a little on her port bow, and, shortly after, the *Mary* at a distance which her captain puts at about four miles. At about one mile, according to the evidence of her captain and the third officer who was on watch (though the evidence of the helmsman and the man at the look-out indicates that this distance was much less), the *Meanatchy* starboarded, her pur-

pose being to pass between the *Mary* and the pilot brig, and round up under the stern of the latter, in order to take a pilot. While the *Meanatchy* was at some distance, the pilot brig hove short, and the learned Recorder has found that she dragged to a position more nearly abreast of the *Mary*, the object of her doing so, no doubt, being to keep nearer to the boat in which the pilot would be dropped. The anchor lights of the pilot brig were not changed. The *Meanatchy* under her starboard helm, with her starboard bow about twenty feet from her stem, struck the stem of the *Mary*, doing, and receiving, damage. The case put forward on behalf of the *Meanatchy* was that her course was misled by a belief that the pilot brig was stationary.

It was also urged on behalf of the *Meanatchy* that the *Mary* was anchored in an improper place having regard to the position of the pilot brig, that there was no proper look-out on board the *Mary*, and that the captain of the *Mary* committed an error in the management of his vessel, namely, in heaving short, instead of at once slacking out the chain of his anchor before the collision.

The learned Recorder asked six questions of his assessors :—

(1.) Were the pilot brig and the *Mary* moored in proper position?

(2.) Was the captain of the *Meanatchy* justified in navigating his vessel as he did?

(3.) Was the pilot brig properly navigated?

(4.) If not, did such improper navigation tend to cause the collision?

(5.) If a proper look-out had been kept on the *Mary*, could a collision have been avoided?

(6.) Did the captain of the *Mary* act properly in giving the order to heave short, or ought he to have ordered the chain to be slacked?

The replies given by the assessors to these questions were as follows :—

(1.) The *Mary* was anchored in a dangerous position.

(2.) Yes. If the brig had remained stationary, the captain of the *Meanatchy* would have been able safely to round under

J. C. 1897 "MARY" TUG COMPANY v. BRITISH INDIA STEAM NAVIGATION COMPANY. THE "MEANATCHY."

her stern without going near the tug. Moreover, the captain of the *Meanatchy* was misled by the fact that the commander of the pilot brig kept his anchor light up when the ship was under way.

(3.) No.

(4.) Yes.

(5.) If there had been a proper look-out, the collision might have been avoided, or its effects mitigated. In our opinion, the master of the tug was not justified in leaving her without a properly qualified person in charge.

(6.) He ought to have paid out chain as the *Meanatchy* was so close to him.

On this advice, the learned Recorder gave judgment for the respondents on the claim and counter-claim.

Their Lordships will first consider the conduct of the *Meanatchy*. It is beyond question that the *Mary* was at anchor, and exhibiting a proper light, that the *Meanatchy* sighted the riding light of the *Mary* a considerable time, and at a considerable distance, before the collision, and that by starboarding her helm in the endeavour to pass between her and the pilot brig she came into collision with her. When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, it is obvious that she has a heavy burden cast on her to justify her conduct. In this case the burden is the more serious because their Lordships are advised by their assessors that, with a tide such as was running up, and, to some extent, across, the Rangoon River, to endeavour to pass between two vessels in the position of the pilot brig and the *Mary* was a proceeding not without risk even in the daytime, still more at night, and that it would have been safer seamanship to have gone round under the sterns both of the *Mary* and of the pilot brig. The justification put forward on behalf of the *Meanatchy* is that she was misled by the movement of the pilot brig and her omission to change her riding light for the lights of a vessel under way. Their Lordships do not desire to express any opinion of the conduct of this vessel, but, assuming that she drifted substantially in the way alleged on behalf of the *Meanatchy*, their Lordships are of opinion that

the *Meanatchy* cannot successfully plead that she was misled by the movement of the light of the pilot brig in order to excuse her collision with the *Mary*.

Their Lordships think that those on the *Meanatchy* should have noticed both the actual movement of the light of the pilot brig, and also that movement in relation to the light of the *Mary*. But they are also advised, and entertain no doubt, that the observation on board of the *Meanatchy* should have been directed to the *Mary* as well as to the pilot brig, and that, had such observation been effective, the course of the *Meanatchy* could without difficulty have been so directed as to avoid collision with the *Mary*. Their Lordships are of opinion that it was the want of sufficient look-out on board the *Meanatchy* especially as regards the *Mary*, and possibly also a miscalculation of distance owing to the force and set of the tide, which brought about the collision, and for these errors the *Meanatchy* cannot be excused.

The case against the *Mary* turns mainly upon the omission to slack away chain as soon as there was risk of collision. There are, however, other charges with which it will be convenient to deal first. It is alleged that the *Mary* was brought to anchor in an improper position. But this, their Lordships think, cannot be sustained. There is no rule prescribing any special place of anchorage for vessels in that part of the Rangoon River, and their Lordships are advised that neither as regards the circumstance that the ship near which the *Mary* lay was a pilot vessel, nor as regards the berth taken up by the *Mary* in relation to that vessel, is any fault to be found. On the latter point, the evidence of the assistant port officer appears to their Lordships to be conclusive. It is also urged that there was a want of look-out on board the *Mary*. In so far as this charge takes the form of an allegation that there was no one on the look-out, or that there was no properly qualified person in charge, the case does not appear to their Lordships to be made out. Their Lordships think that it would not be proper to hold that the captain was necessarily to blame for leaving his own vessel at anchor and going on board the pilot brig, and they see no reason to doubt that the engineer

J. C. 1897 "MARY" TUG COMPANY v. BRITISH INDIA STEAM NAVIGATION COMPANY. THE "MEANATCHY."

left in charge was competent to perform the duties of an anchor watch, and was attending to them.

The facts as to the action of the *Mary* appear to be that shortly before the collision, and in consequence, as their Lordships think, of the approach of the *Meanatchy*, the captain of the *Mary*, who was then in a boat alongside, or astern, of his vessel, ordered her to be hove short on her cable with the intention, which was accomplished, of making her drift astern. The *Mary* by this process first moved forward about thirty feet and then dragged astern, so that, possibly, she was not quite so far astern at the collision as she would have been had anchor chain been paid out at once.

Their Lordships entertain no doubt that in the case of a vessel at anchor there is an obligation to keep a competent person on watch, and that it is his duty not only to see that the anchor light or lights are properly exhibited, but also to do everything in his power to avert or to minimise a collision. Many such things may no doubt be done; and it is necessary also to be prepared to summon aid for any needful purpose. The case of *The Clara* (1), decided in the Supreme Court of the United States, on which reliance was placed by the learned counsel for the respondents, does not appear to their Lordships to go beyond a recognition of this general principle. It would appear that the Supreme Court, in appeals from the Circuit Courts, has a jurisdiction limited to a determination of questions of law raised on the record, or by bill of exceptions. The Circuit Court found as facts that the plaintiffs' ship the *Julia Newell*, with which the *Clara* came into collision, was improperly lying at anchor, without a watch on deck; that a storm was increasing, and set in about the time the *Clara* came to anchor, and was a very severe snow-storm; that if the *Julia Newell* had had a sufficient watch on deck the accident might have been prevented; and that the *Clara* was well manned and had proper lights and a proper look-out; and the Circuit Court held that the failure to keep a watch on the deck of the *Julia Newell* was the cause of the collision. It cannot be ascertained from the report, nor was it material to be stated, as only ques-

(1) (1880) 102 U. S. 200.

tions of law could be considered, what particular course might have been adopted on board the *Julia Newell* to have prevented the collision. The Supreme Court held that the *Julia Newell* was alone to blame; but this decision affords no aid in the present inquiry, because it proceeds on the assumption of such negligence and its results, as in the present case constitute the very issues in controversy.

Not only, however, is the general obligation as to an anchor watch insufficient to dispose of the questions raised in this case, but, even if it be conceded that the person in charge was guilty of an error of judgment, other considerations arise. It has to be considered whether, had the course which is suggested as the best been taken, the result as to the collision would have been materially affected; and their Lordships are advised that there is no reason to suppose that, had the chain been slacked away at the earliest moment at which such action would have been proper, the collision would have been averted, or its results mitigated. But even were this more doubtful than their Lordships think it is, another point of importance remains. A competent sailor, as their Lordships are advised, would have been justified till a very late moment in assuming that the *Meanatchy* would, as she easily could, have abstained from an attempt to cross his bows; and so long as there was a reasonable possibility that the *Meanatchy* would go under his stern he would not have aided, but, on the contrary, might have hampered, such a manœuvre by causing his own vessel to drift astern. Being thus placed, entirely by the erroneous conduct of the *Meanatchy*, in a position of difficulty in which an instant step was imperative, he became entitled, as this and other tribunals have often held, to claim a favourable consideration for the action which he decided to take, even if it should afterwards appear that such action was not the best possible.

It was suggested by the counsel for the respondents that the order by the captain of the *Mary* to heave short was given without reference to the approach of the *Meanatchy* before any risk of collision, and merely in order to bring his vessel nearer to the boat in which he was lying. As above stated, in their Lordships' opinion, this was not so in fact; but, if it were, it is

J. C. 1897 "MARY" TUG COMPANY v. BRITISH INDIA STEAM NAVIGATION COMPANY. THE "MEANATCHY."

all the more probable that the *Mary* had at the time of the collision drifted astern as far as if her chain had been paid out just before it; and, indeed, if the vessel was already drifting, it would have become of little or no use to pay out chain.

For these reasons their Lordships are of opinion that the *Meanatchy* must be held alone to blame for the collision.

Their Lordships will humbly advise Her Majesty that the decision of the Court of the Recorder should be reversed, and judgment entered for the appellants on the claim and counter-claim, and the case remitted in order that the damages due to the appellants may be ascertained. The respondents must pay the appellants the costs of this appeal, and the costs of the claim and counter-claim in the Court below.

Solicitors for appellants: *Lattey & Hart.*

Solicitors for respondents: *Waltons, Johnson, Bubb & Whatton.*

[PRIVY COUNCIL.]

J. C.* 1897 *Feb.* 9; *April* 7

ARSÈNE A. LAROCQUE . . . . . PLAINTIFF;

AND

HYACINTHE BEAUCHEMIN . . . . DEFENDANT.

ON APPEAL FROM THE SUPERIOR COURT FOR QUEBEC SITTING IN REVIEW.

Quebec Revised Statutes, Art. 4722 (1), (5)—*Shares—Payment in Cash—Price of Property sold to Company.*

The shares of promoters of a company incorporated under the Revised Statutes of Quebec having been credited as paid in full under an arrangement by which half the amount thereof was paid in cash and half by receipts on account of the purchase price of the property acquired by the company:—

Held, that under art. 4722, par. 1 (originally enacted as s. 1 of Quebec Statute 47 Vict. c. 73, and reproducing s. 25 of the English Companies

---

* *Present:* LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND.

Act, 1867), the shares were rightly so credited; the promoters having acted in good faith and the purchase price being fair.

Spargo's Case, (1873) L. R. 8 Ch. 407, approved.

APPEAL from a decree of the Court of Review (Dec. 31, 1895), in the Province of Quebec, affirming a decree of the Superior Court (Nov. 24, 1894), dismissing an action brought by the appellant, as liquidator of La Compagnie de Papier de Sorel, to recover from the respondents as shareholders an alleged unpaid balance of 50 per cent. of their subscribed stock.

The facts are stated in the judgment of their Lordships.

The Superior Court (Tait J.) dismissed the action, the sole considérant of the judgment being that appellant had failed to prove the material allegations of his declaration. The Court of Review confirmed this judgment, merely saying that they found no error in it. It appeared, however, from the notes of Jetté J., that they considered the company's claim for 50 per cent. of the stock had been set off against $25,000 of the purchase price of the property, which they regarded as a payment "in cash," within the meaning of the law.

The appeal was brought against all the respondents; but the respondents Durocher and Bourque challenged the validity of the appeal as far as they were concerned, the amount of their liability being less than 500*l.*, and consequently the appeal as to them was discontinued.

E. Blake, Q.C., for the appellant, contended that the respondents did not pay in cash within the meaning of the statute more than 50 per cent. of their stock, and that consequently, by the true construction of art. 4722, paragraph 1, of the Revised Statutes of Quebec, they were liable to pay the remaining 50 per cent. The evidence shewed that the property sold to the company was only worth $10,000. The contract of sale and purchase was not bonâ fide. The price was arranged and the plan devised between the parties to effect an improper sale for a fictitious and exaggerated price at the cost of the projected company by treating the respondents' shares as half paid up in respect of their intended profit. There was no independent contract for the purchase of the property in cash, nor any contract to take

J. C.
1897
LAROCQUE
v.
BEAUCHEMIN.

up shares to be paid in cash. There was merely a bargain that shares should be taken which should as to half of their nominal value represent part of the price of the property, and it was contended that the respondents could not hold the company to this bargain. Further, the placing on the property of the increased value of $35,000 represented by stock violated art. 4722 so far as it prohibited issue of stock as representing increased value of property.

[Reference was made to *Fothergill's Case* (1); *In re Almada and Tirito Co.* (2); *White's Case* (3), which distinguished *Spargo's Case* (4); *Bird* v. *Bird's Patent Sewage Co.* (5); *In re Barrow-in-Furness Investment Co.* (6); also to *Bentley's Case* (7); *Kent's Case* (8); *In re Johannesburg Hotel Co.* (9); *Ooregum Co.* v. *Roper.* (10)]

Cozens-Hardy, Q.C., Cartmell, and *Allan,* for the respondents, contended that the evidence did not prove, and did not even attempt to prove, a case of bad faith on their part in the transaction in question; and without clear proof of bad faith, the Courts will not go behind such an agreement as was come to in this case. The company received for the respondents' shares full "payment in cash" within the true meaning of those words as used in art. 4722.

[Reference was made to arts. 1139, 1187, and 1189 of the Civil Code, and it was contended that the respondents had fully answered their obligation to pay for their shares within the meaning of those sections.

Spargo's Case (4) was relied on as the governing authority.]

Blake, Q.C., replied.

1897
April 7.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellant is the liquidator of a company called La Compagnie de Papier de Sorel, incorporated in 1886 under an Act of the Provincial Legislature of Quebec

(1) (1873) L. R. 8 Ch. 270.
(2) (1888) 38 Ch. D. 415, 422.
(3) (1879) 12 Ch. D. 511.
(4) L. R. 8 Ch. 407.
(5) (1874) L. R. 9 Ch. 358.
(6) (1880) 14 Ch. D. 400.
(7) (1879) 12 Ch. D. 850.
(8) (1888) 39 Ch. D. 259.
(9) [1891] 1 Ch. 119, 126.
(10) [1892] A. C. 134.

known as "The Joint Stock Companies Incorporation Act." The authorized capital stock of the company was $100,000 divided into 1000 shares of $100 each. The subscribed capital was $55,000 or 550 shares.

The respondents are some of them shareholders, and the rest the representatives of deceased shareholders in the company. The shareholders whose representatives are parties to the action together with those of the respondents, who were themselves shareholders, were the promoters of the company. From them the company bought the property upon which it carried on its business; and they held the whole of the subscribed stock with the exception of fifty shares belonging to Mr. Finlay, the manager.

The action was brought to recover from the respondents in their individual or representative capacities sums amounting in the aggregate to $25,000. The relief sought was based on fraud and nothing else. The declaration in the action stated that although the nominal and ostensible price of the property was $35,000, the real price actually paid was $10,000 only, and it charged that the property was in fact worth no more; the difference, according to the statement in the declaration, was accounted for in the books of the company by means of entries which the appellant as plaintiff alleged to be false and fictitious, making it appear that the promoters had paid up their shares in full while $25,000 still remained unpaid.

The facts are not in dispute. The property had belonged to a company called "The St. Lawrence Pulp and Paper Company," which failed almost immediately after it commenced operations. The liquidator put the property up for sale by auction in March, 1886. It was then bought by or on behalf of four persons interested in the old company for the sum of $9000. The purchasers entered into communication with certain persons described by the respondent Beauchemin, who was one of their number, as "capitalists," with the view of forming a new company and re-establishing the business. M. Beauchemin was called as a witness by the plaintiff. He said that the four purchasers represented that the property which they had bought was worth $50,000, but that he would not

J. C. 1897 LAROCQUE v. BEAUCHEMIN.

take it at that price, and as the result of negotiations it was agreed that the property should be sold to the new company as soon as it was formed for $35,000, and that the difference between that sum and the auction price, which by the addition of interest and incidental expenses was brought up to $10,000, should be for the benefit of the promoters of the new company —that is, for the four purchasers and M. Beauchemin and his friends.

The evidence as to value was clear and uncontradicted. A M. Pontbriand, a manufacturer living in Sorel, who was interested in the old company was called for the defence. His firm, he said, had made the machinery and put it up. He knew the property well. Including land, buildings, and machinery it had cost about $80,000, a sum which unfortunately exhausted the whole of the capital of the company. He valued the property at the time of the liquidation to the old company at $41,150. At the time of the sale the machinery was in perfect order, but the buildings required some slight repairs, which might cost $1000 or so. For the purpose of a paper manufactory the property, was he considered, worth $40,000. It would have cost the new company from $50,000 to $55,000 to provide itself with similar works elsewhere.

On May 5, 1886, the promoters and Mr. Finlay, who had then joined the enterprise, having subscribed between them $55,000 towards the joint stock of the proposed undertaking, held a provisional meeting as shareholders in the new company. The meeting appointed provisional directors, and authorized them to make an immediate call on the capital subscribed and to apply for incorporation. The directors accordingly met and made a call of 75 per cent., payable on May 20.

On June 26, 1886, a petition for incorporation was presented on behalf of the shareholders in the new company. The petition set forth the particulars required by the Act, including the names of the shareholders and the amounts subscribed by them respectively. Letters patent incorporating the new company were duly granted on August 5.

On September 3 a meeting of the shareholders was held; the minutes of the former meetings were read and adopted and

directors were appointed. At a meeting of the directors held on the same day, the President, M. Beauchemin, was authorized to sign in the name of the company the deed of sale of the property, and to acquire it from the then owners for the price of $35,000, and a final call was made of 25 per cent., payable on October 16.

In September, 1886, the promoters were credited in the books of the company with payment in full of their shares. The amounts so credited were paid half in cash and half by receipts given to the company by the vendors to the extent of $25,000 on account of the purchase price of the property.

After working for about two years and a half the company went into liquidation. In June, 1889, the appellant was appointed liquidator, and in March, 1890, he was authorized to institute this action.

The action came on to be heard before the Superior Court on November 24, 1894, when it was dismissed with costs. The Court held that the plaintiff had failed to prove the material allegations of his declaration. The judgment was affirmed on appeal by the Superior Court sitting in Review on December 31, 1895.

It appears from the reasons given by the Honourable Jetté J. that the only question argued before the Court of Review was whether the shares of the promoters were paid in full having regard to the provisions of art. 4722 of the Revised Statutes of Quebec, which formed part of the statute under which the company was incorporated. That article, so far as is material to the present question, is as follows:—

"(1.) The capital stock of all joint stock companies shall consist of that portion of the amount authorized by the charter which shall have been bonâ fide subscribed for and allotted and shall be paid in cash.

* * * *

"(5.) Every form and manner of fictitious capitalization of stock in any joint stock company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented by an amount of cash paid into the treasury of the company, which has been

J. C. 1897

LAROCQUE v. BEAUCHEMIN.

expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void."

Jetté J. considered that paragraph 1 of art. 4722, which was originally enacted as s. 1 of the Quebec statute 47 Vict. c. 73, was a reproduction more or less exact of s. 25 of the Imperial statute known as the Companies Act, 1867. Construing the expression "paid in cash" in art. 4722, paragraph 1, by the light of well known English authorities as to the meaning of the same words in s. 25 of the Imperial statute of 1867, his Honour held that the shares of the promoters were fully paid.

Before their Lordships an attempt was made to re-open the charge of fraud, which seems to have been abandoned in the Court of Review. It was urged that the price of the property was not fixed or considered by an independent board of directors, and that in this respect the transaction was improper and fraudulent. This argument seems to be based on a misconception of the decision in *Erlanger* v. *New Sombrero Phosphate Co.* (1), where the facts were very different. In the present case it was not disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the company, and that nobody was or could have been deceived. Indeed, their Lordships agree with the opinion of Jetté J., who prefaced his judgment by observing that the promoters acted in perfect good faith, and that the value of the property was proved to be $35,000 at the least.

The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so much in cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the statute. But the evidence is all the other way. According to the evidence there was an independent agreement on the part of the promoters to take so many shares presently payable in cash, and an independent agreement by the company to purchase the property for so much money down. There was not even an attempt in cross-examination to shake the testimony on this point.

The appellant's counsel were at last driven to question the

(1) (1878) 3 App. Cas. 1218.

authority of *Spargo's Case* (1), and the long line of decisions in which that case has been approved and followed. They pointed out that on more than one occasion *Spargo's Case* (1) has been disapproved by the present Lord Chancellor—*In re Johannesburg Hotel Co.* (2); *Ooregum Co.* v. *Roper* (3)—and they asked their Lordships not to follow it.

Their Lordships are not prepared to dissent from the decision in *Spargo's Case.* (1) It is a decision of the highest authority. It was pronounced by James and Mellish L.JJ., and the view which those eminent judges expressed had, as appears from their judgments, the approval of Selborne L.C. Referring to *Fothergill's Case* (4), in which s. 25 of the Act of 1867 was considered, and in which judgment had been delivered only the day before by the Lord Chancellor and the Lords Justices, James L.J. made the following observations, which are not inapplicable to the facts of the present case: "It was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision. . . . If a transaction resulted in this, that there was on the one side a bonâ fide debt payable in money at once for the purchase of property, and on the other side a bonâ fide liability to pay money at once on shares, so that if bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case* (4), and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands

(1) L. R. 8 Ch. 407.
(2) [1891] 1 Ch. 119.
(3) [1892] A. C. 134.
(4) L. R. 8 Ch. 270.

J. C. 1897 LAROCQUE v. BEAUCHEMIN.

are set off against each other, the shares have been paid for in cash. . . . Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham or evasion or trick to get rid of the effect of the Act of Parliament; but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case." "It is a general rule of law," added Mellish L.J., "that in every case where a transaction resolves itself into paying money by A. to B. and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." Even if this line of argument were less convincing than it appears to their Lordships to be, they would not be disposed to disturb an authority which has been accepted and acted on for more than twenty years.

It is to be observed that in the Quebec statute the expression "paid in cash" occurs in one place, and "paid in cash into the treasury of the company" in another, from which it may be inferred that "payment in cash" does not necessarily and in all cases mean payment "into the treasury of the company."

In the result their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

It appears that, during the pendency of the appeal, proceedings were stayed against two of the respondents, against each of whom the claim was under the appealable limit. The order will include the dismissal of the appeal with the usual consequences as against those two respondents.

Solicitor for appellant: *S. V. Blake.*
Solicitor for respondents: *Guy Ellis.*

[PRIVY COUNCIL.]

THE BELIZE ESTATE AND PRODUCE COMPANY, LIMITED . . . . . } PLAINTIFFS; J. C.* 1897 March 10, 24; April 7.

AND

QUILTER . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Law of British Honduras—Registered Title—Adverse Possession—Consolidated Laws of 1887, *c.* 106, *s.* 30; *c.* 19, *s.* 5—*Limitation.*

Held, with regard to the British Honduras Consolidated Laws of 1887, that the provisions of the Limitation Act (c. 19) apply to lands held under a title registered under the Lands Titles Registry Act (c. 106); and that consequently twenty years' adverse possession extinguishes by force of s. 5 of the former Act a title registered under the latter Act.

APPEAL from a judgment of the Supreme Court (Oct. 23, 1896).

On September 16, 1896, the appellant company issued a writ of summons claiming damages from the respondent for wrongfully entering on the appellants' land and cutting down their timber.

No pleadings were delivered, but a special case was stated by consent under the Consolidated Laws of the Colony, c. 13, s. 148, stating that the appellant company was the registered owner under the Honduras Lands Titles Acts of the lands in suit, and submitting the question:—

"Whether twenty years' adverse possession will establish a title adverse to the registered owners of lands registered under the Honduras Lands Titles Acts?"

At the hearing there was an oral admission by the parties that the twenty years in question began subsequently to the registration of title.

The judgment of the Chief Justice referred to the existing Land Title Act, c. 106, which incorporates the previous Acts on the subject of title to land. "This Act," it says, "only vests in the registered proprietor of freehold land with an

* *Present:* LORD WATSON, LORD HOBHOUSE, and LORD DAVEY.

J. C. 1897 BELIZE ESTATE AND PRODUCE COMPANY v. QUILTER.

absolute title an estate in fee simple, and it would seem obvious that if it was intended that the estate so registered should not be subject to the Statute of Limitations, it would be necessary that there should be an express provision to give effect to such an intention." With reference to s. 30 of the Act, set out in their Lordships' judgment and relied upon by the appellant as exempting a registered owner from the operation of the Statute of Limitations on his registered title, it held that that section had no such effect "either by express words or by implication."

The Chief Justice, the question having been stated in an action of trespass, held that s. 6, c. 19, of the Consolidated Statutes, which barred the remedy sought, applied to a registered title. Accordingly he answered the question submitted (which depends on s. 5) in the affirmative.

Jelf, *Q.C.*, and *Terrell*, for the appellants, contended that this judgment was wrong. According to the true construction of s. 30 of c. 106, the appellants are absolutely entitled to the land in suit to the exclusion of the respondent and all other persons. The Chief Justice had put a limited interpretation on that section, restricting it to such persons as had or might have made adverse claims, and to such estates as might have been subjected thereto prior to registration. But ss. 15 and 16 of c. 106 were operative for that purpose, and s. 30 so construed would be superfluous. The register of titles, established under c. 106, is the only evidence of title registered under that chapter. Being a special law dealing with a special class of land, it ought not to be overridden by c. 19, which is a general law dealing with land in general. To apply s. 5 of c. 19 to registered land is inconsistent with the operation of s. 30 of c. 106. That section provides for the protection of every kind of title known in the Colony, with the single exception of title gained by possession, and must be presumed to have intended to exclude possession as a foundation of title to registered land; and the following sections provide for the acquirer of title from a registered owner by any means other than adverse possession getting registration of such acquired title. [Reference was

made to the English Registry Act of 1875 (38 & 39 Vict. c. 87), s. 21.]

Cohen, Q.C., and *Cowell*, for the respondent, were not heard.

1897. April 7. The judgment of their Lordships was delivered by

LORD WATSON. The appellant company are the owners, duly registered under the Honduras Lands Titles Registry Act, of two parcels of land situated on the Belize River, known as "Erindale" and "Double Headed Cabbage." In September, 1896, they brought an action of damages, in the Supreme Court of Honduras, against the respondent, William Burn Quilter, upon the allegation that he had wrongfully entered these lands and cut down timber belonging to them. Before defences were lodged, the parties submitted a special case for the opinion of the Court, pursuant to c. 13, s. 148, of the Consolidated Laws of the Colony; from which it appears that the respondent meant to rely upon his having been in adverse possession of the lands for the period of twenty years before the suit was instituted. At the hearing of the special case before the Chief Justice of Honduras, the parties concurred in further stating that the twenty years commenced subsequently to registration of the appellants' title. The question submitted for the opinion of the Court was: "Whether twenty years' possession will establish a title adverse to the registered owner of lands registered under the Honduras Lands Titles Act?"

The learned Chief Justice on October 23, 1896, answered the question in the affirmative, being of opinion that the provisions of the Colonial Limitation Act apply to lands held under a title duly recorded in terms of the Lands Titles Registry Act; and, consequently, that twenty years' adverse possession by the respondent of the lands in question would afford a good defence to the appellants' suit.

The statutes of the Colony regulating the limitation of rights of entry, distress, or action, and also the registration of land titles, have been from time to time re-enacted, and they have now been included in the Consolidated Laws of 1887, the law of "Limitation of actions, suits, and distresses, &c," and that

J. C. 1897 BELIZE ESTATE AND PRODUCE COMPANY v. QUILTER.

relating to the "British Honduras Land Registry," forming respectively chapters 19 and 106 of that statutory code. In the argument addressed to their Lordships, it was not disputed by the appellants' counsel that the terms of the Limitation Act, if taken by themselves, are sufficient to include and apply to all lands in the Colony, whether the title to such lands be registered or not; and, also, that the Lands Titles Registry Act contains no provision which expressly exempts lands held under a registered title from the operation of the law of limitation. But they maintained that, by the Registry Act, certain rights and privileges are conferred upon the holders of a registered title which are altogether inconsistent with the applicability of the Limitation Act to their lands, and these special provisions must, as matter of plain implication, be held to exclude the operation of the Limitation Act upon these lands. In order to estimate the force of the argument, it becomes necessary to refer to those provisions of the two Acts which are said to be thus repugnant.

Chap. 19, s. 5, enacts that at the determination of the period limited to any person for making an entry or distress, or bringing any writ or action or suit, "the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

The rights and privileges accruing to a landowner whose title is upon the register are defined by s. 30 of c. 106, which contains the enactments upon which the argument of the appellants' counsel was mainly founded. It is in these terms:—

"The person or persons who, according to the entries made according to this chapter in the register, appear to be entitled, according to this chapter, to land, or to any legal estate, interest, power or right in or affecting land, shall be entitled accordingly, and to the exclusion of all other persons, and of all other estates, interests, powers and rights, not being equitable estates or interests, in or affecting the said land or any part thereof; and the register shall be to all intents and purposes whatsoever, and to the exclusion of all other evidence (evidence of fraud only excepted), the foundation, and the evi-

dence of the foundation of the title to the land registered, and to the estates, interests, powers and rights registered; and the registered land, estates, interests, powers and rights respectively may and shall descend, devolve, and be transmitted, dealt with, disposed of, and enjoyed accordingly; Provided notwithstanding that in regard to all titles to lands, founded upon previous grants from the Crown, all the reservations, provisoes and conditions contained in those grants shall be preserved."

Sect. 31 and subsequent clauses of the same Act make provision for entering on the register continuations of the title, (1.) by transfer, (2.) by legal devolution to his heir on the death of a registered proprietor, intestate, and (3.) by devise to take effect after his death.

The enactments of s. 30 appear to their Lordships to provide that the entries in the register, unless proved to have been fraudulently procured, are to be conclusive in favour of the persons therein designated as owners, to the extent and effect of shewing that they are vested with a title giving them the right to possession of the lands, interests, and powers or rights in or affecting land which the register describes as their property; and are to be equally conclusive against any person who attempts to set up a title in competition with theirs. According to the appellants' contention, the clause goes a great deal further; and not only makes the register the sole foundation and evidence of title, but at the same time makes it conclusive evidence (although the fact may be otherwise) that the registered owner has all along been, and still is, in actual possession of the land. That it would have been within the competency of the legislative authority of Honduras to make an enactment to that effect does not admit of question; but one would expect to find an exceptional provision of that kind expressed in plain and unambiguous language. Their Lordships are unable to discover, either in s. 30 or in any other clause of the Act, a single expression indicating that the Legislature meant to deal with any question of possession.

The 31st and following clauses of the Act were referred to and relied on by the appellants' counsel for the purpose of shewing that, whilst means are provided for entering and keeping on the register the names of those persons who may become

J. C. 1897 BELIZE ESTATE AND PRODUCE COMPANY v. QUILTER.

entitled to registered land by transfer, or by succession whether testate or intestate, no provision whatever is made for enabling a person who, without title, has been in adverse possession of registered land for upwards of twenty years, to put upon the register an entry of any right or interest which he may thereby have acquired. That would appear to be the case; but it does not necessarily follow that the right of the registered proprietor cannot be affected by adverse possession under the Act of Limitations.

The adoption of the Lands Titles Registry Act by proprietors is permissive; and it is not made imperative that, when a title has once been put upon the register, it shall thereafter continue to be registered in the name of each successive owner. A registered title may come to an end through the death of a proprietor intestate and without leaving heirs. In that event, the land would revert to the Crown, who presumably would not, as there is no provision made for its so doing, put its name on the register. The Crown might, and probably would, make a new grant of the land to a subject, who, if he desired to possess a registered title, would be under the necessity of making a fresh application under the Act.

According to s. 5 of the Act of Limitations, the right and title of the true proprietor of land, which is and has been the subject of adverse possession by one having no title of property, to bring a suit for recovery of possession is absolutely extinguished by the lapse of the statutory period of twenty years. If that enactment had been inserted in the Lands Titles Registry Act, their Lordships do not think there would have been the least colour for the contention that it was repugnant to any of the other provisions of the statute. In their opinion, the fact that the clause occurs in another statute forming part of the same code of law makes no difference in result.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal. The costs incurred by the respondent in this appeal must be borne by the appellants.

Solicitors for appellants: *Rooke & Sons.*
Solicitors for respondent: *Parker, Garrett & Holman.*

[PRIVY COUNCIL.]

WAVERTREE SAILING SHIP COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

LOVE AND ANOTHER . . . . . DEFENDANTS.

J. C.* 1897 *Feb.* 16; *May* 22.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Average Bond—Average Statement—No Duty to employ an Average Stater.

Where, by an average bond executed at the port of discharge, consignees of cargo undertook to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contribution to which they were liable might be ascertained and adjusted "in the usual manner":—

Held, that these words did not imply as a condition of the obligation that the shipowners should employ an average stater at the port of discharge.

Simonds v. *White* (2 B. & C. 805) explained.

A shipowner may make out his own average statement, and is not bound to employ an average stater either at the port of discharge or elsewhere.

APPEAL from a decree of the Supreme Court (Nov. 7, 1895) affirming a decree of the Chief Judge in Equity (Sept. 23, 1895) which dismissed the appellants' suit with costs.

The question in the appeal was whether or not under a certain average bond entered into in consequence of a general average act which occurred at Sydney, New South Wales, the consignees (resident in Sydney) of cargo shipped from London were bound to furnish to an average stater or adjuster in Liverpool particulars of their claims for the purpose of the general average being adjusted in Liverpool.

The facts are stated in the judgment of their Lordships. The reports of the proceedings in the Court below will be found in 16 N. S. W. L. R. 271, 276.

* *Present:* LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

J. C. 1897

WAVERTREE SAILING SHIP COMPANY v. LOVE.

The material portion of the judgment of the Chief Justice in appeal is as follows :—

Now it seems to me so unreasonable to suppose that, although the adjustment is to be made according to the law of the port of destination, yet the shipowner may have the adjustment made wherever he likes that one would require to have some authority before supporting such a proposition. No authority has been referred to where such a course was adopted; on the contrary, I find abundant authority the other way. So far back as the year 1824 Lord Tenterden, one of the greatest authorities upon mercantile law that ever sat on the English bench, laid down the law with regard to the adjustment of general averages in the case of *Simonds* v. *White*. (1) In that case a British ship struck on a reef of rocks at St. Petersburg, the port of destination, and certain expenses were incurred which were the subject of a general average payment according to the law of Russia, though not according to the law of England. A consignee having paid his respective share of this claim in order to obtain possession of his goods sought to recover the amount paid on the ground that the general average ought to have been adjusted according to the law of England and not of Russia. The Court held that he could not recover back the amount paid, as the general average must be adjusted according to the port of destination. "The shipper of goods," says Abbott C.J., "tacitly if not expressly assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made."

In the year 1872 there is reported the case of *Harris* v. *Scaramanga*. (2) That is an instructive case, and shews the mischief that would be done if the plaintiffs' contention were correct and the shipowner were allowed to have the statement

(1) (1824) 2 B. & C. 805.

(2) (1872) L. R. 7 C. P. 481.

made up where he chose. There underwriters, in insuring a cargo of rice from Taganrog to Bremen, had agreed to "pay general average as per foreign statement if so made up" in case the insured goods became liable. The Court held that the underwriters were bound to pay according to the statement made by the average adjuster in the foreign port if it was presented, and they could not go behind it and obtain a decision of a court of law upon the correctness of the adjustment. Bovill C.J., in delivering the judgment of the Court, says: "Upon that voyage the vessel with her cargo on board having reached Bremen *that* was the proper port for the adjustment of any claim or liability for general average, and the adjustment would have to be made there according to the law of Bremen, and would be binding as between the shipowner and the owners of the cargo." Then, further on, he says: "It seems to me that the general effect of the memorandum is to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. . . . .

"How is the question to be determined of whether the claim in this case is to be considered as general average for which the underwriters are liable? Is it to be determined by this Court or by the statement of the foreign average stater? It seems to me that by the express agreement of the parties it is not open to us to determine it, and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not." Again, he says (1): "It appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad."

Then finally comes the case of *The Brigella* (2), where Barnes J., the learned judge of the Admiralty Court, speaking generally and not with reference to the particular case then before him, says: "Adjustments are made at the port of destination or where the voyage is broken up because of the

(1) L. R. 7 C. P. 491. (2) [1893] P. 189, 201.

J. C. 1897 WAVERTREE SAILING SHIP COMPANY v. LOVE.

necessity for an adjustment at the place where the interests separate and at a time when the master can compel the contributories to pay or secure the amounts to be contributed before he parts with the goods and gives up his lien upon them."

These authorities from 1824 down to the present time seem to me to be sufficient to establish that it is a settled principle of law that adjustments must be made up at the port of destination. It is clear from the correspondence in this case that the plaintiffs demanded the particulars for the purpose of having the adjustment made up in Liverpool; as the defendants had only agreed to furnish the particulars to enable the general average to be made up in the usual manner, they were justified in refusing to produce them; and this appeal must be dismissed with costs.

Sir W. Phillimore, and *Maurice Hill*, for the appellants, contended that on the true construction of the average bond the respondents were bound to furnish the particulars sought; and were not entitled to require as a condition precedent that the average statement should be made up by average adjusters at Sydney. The average statement or adjustment is not an adjudication between the parties. Even if it were there is no evidence of any intention on the part of the appellants to apply any law other than that of the port of discharge. It was admitted that there was no difference between the law of England and the law of Sydney as to general average. The appellants never proposed to have the average statement made up otherwise than in accordance with the terms of the average bond. They were entitled if they chose to have it made up by average adjusters in Liverpool; and their doing so did not release the respondents from their obligation to furnish particulars.

[Reference was made to *Crooks* v. *Allan* (1), and especially to the judgment of Lush J. therein; *Strang* v. *Scott* (2); *Mavro* v. *Ocean Marine Insurance Co.* (3); Abbott on Shipping (last ed.), p. 663; *Royal Mail Co.* v. *English Bank of Rio de*

(1) (1879) 5 Q. B. D. 38.
(2) (1889) 14 App. Cas. 601.
(3) (1875) L. R. 10 C. P. 414; S.C. 2 Aspin. Mar. Law. 361, 590.

Janeiro (1); *Schuster* v. *Fletcher* (2); *The Energie* (3); *Henderson* v. *Shanklin*. (4)]

Simonds v. *White* (5) is the only case cited below which touches the point; while cases like *Whitecross Wire Co.* v. *Savill* (6) and *Shepherd* v. *Kottgen* (7) shew the inconvenience of the strict rule contended for.

Joseph Walton, Q.C., and *Bateson*, for the respondents, contended that the proper place for the adjustment of a general average is the ship's port of destination, that is, in this case, Sydney. Authorities both before and after *Simonds* v. *White* (5), which was relied on as the leading case, concur in that view. Delay would be injurious to the interests of the contributories, and it would be most inconvenient to adjust the average in Liverpool while all the parties were resident or represented in Sydney. All the documents were in Sydney; surveys, sales and valuations would be made there, and all the details of adjustment managed there, for such a distance as Liverpool would involve great delay, inconvenience and expense. On the true construction of the bond the "usual manner" of ascertaining and adjusting an average within the meaning of the average bond is to ascertain and adjust it at the port of destination directly after its arrival.

[Reference was made to Benecke on Marine Insurance, pp. 324, 325; Park on Insurance, p. 208; Manley Hopkins on Average and Arbitration, p. 72.]

The judgment of their Lordships was delivered by

LORD HERSCHELL. The appellants were the owners of the sailing ship *Wavertree*, which carried goods for several consignees, amongst whom were the respondents on a voyage from London to Sydney. Whilst the vessel was in the port of Sydney and before the cargo was discharged a fire broke out on board, and expenditure was incurred which gave rise to a claim for general average contribution from the owners of the cargo.

(1) (1887) 19 Q. B. D. 362.
(2) (1878) 3 Q. B. D. 418.
(3) (1875) L. R. 6 P. C. 306.
(4) [1896] 1 Q. B. 525.
(5) 2 B. & C. 805.
(6) (1882) 8 Q. B. D. 653.
(7) (1877) 2 C. P. D. 578, 585.

J. C.
1897
WAVERTREE SAILING SHIP COMPANY v. LOVE.

On June 10, 1892, an average bond was executed between the master of the vessel of the one part and the several consignees of the cargo of the other part. The master thereby undertook to deliver to the parties of the second part their respective consignments, and they on the other hand agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particular of the value of the goods delivered to them respectively in order that any such general average charges might be ascertained and adjusted in the usual manner. It was further agreed that the consignees should deposit in a bank in the joint names of Dalton on behalf of the master and owners and Anderson on behalf of the depositors 20 per cent. on the amounts of the estimated value of their respective interests. Power was given to the trustees to advance to the master or owners such sums as might be certified by the average adjuster or adjusters employed to adjust and state the general average charges to be a proper sum to be from time to time advanced. Subject thereto the deposits were to be held upon trust for the payments of the general average to the parties entitled thereto, with an ultimate trust for the depositors respectively. The bond contained the following clause:—"Provided always that nothing herein contained shall constitute the average adjuster or adjusters who may be employed arbitrator or arbitrators or his or their adjustment or statement a final settlement between the parties hereto."

The present action was brought in respect of a breach of the agreement by the respondents to furnish a correct account and particular of the value of the goods delivered to them in order that the general average charges might be ascertained. The statement of claim alleged that the plaintiffs had made frequent applications to the defendants to furnish such account and particular, but that the defendants had always refused to furnish the same. The defence set up was that the defendants had always been ready and willing to supply particulars for an average statement to be made up in Sydney, but that the plaintiffs refused to have the average settlement made up in

Sydney, and claimed that they were entitled to have the same made up in and according to the law of the port of Liverpool. As regards the allegation that the plaintiffs claimed the right to have the average statement made up according to the law of Liverpool, it may be at once stated that there was no evidence of it, and, moreover, that as regards general average the law of the port of Sydney does not differ from the law prevailing at Liverpool.

The controversy between the parties arose in this way. The appellants having employed Messrs. Loftus & Co. of Liverpool to make out a general average statement, that firm sent through Messrs. Dalton Brothers, the ship's agents at Sydney, a circular letter to the several consignees asking for certain particulars which they needed. The respondents thereupon took up the position that the average bond contemplated the general average being adjusted at Sydney, that in employing average staters at Liverpool the appellants were taking an improper course, and that the respondents were under no obligation to supply particulars for use by those gentlemen.

It is obvious that there has been a breach of the obligation which the respondents in express terms undertook, unless there was a condition implied in the agreement that the appellants should employ an average stater residing at Sydney to make up a general average statement. The judge in equity held, and the Supreme Court have sustained his view, that there was such an implied condition, and that the respondents had therefore justified their refusal to furnish the necessary particulars.

Their Lordships are unable to concur in the view taken by the Court below. It was founded upon the provision in the average bond that the particulars were to be furnished in order that the general average charges might be ascertained and adjusted "in the usual manner," these words being regarded as requiring that an average stater at Sydney should be employed to prepare the average statement, and as excluding the employment of an average stater residing elsewhere. In their Lordships' opinion this view involves a misconception of the nature and functions of an average statement and of the position of the shipowner and other parties interested in relation to it.

J. C.
1897
WAVERTREE SAILING SHIP COMPANY v. LOVE.

The profession or calling of an average stater, or average adjuster as it is sometimes called, is of comparatively modern origin. The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them. It is put forward by the shipowner as representing his view of the general average rights and obligations, but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute. The average bond entered into in the present case no doubt contemplated that an average stater would be employed, and if not so employed the shipowner could have derived no benefit from the provisions which enable the trustees if they think fit to make advances out of the moneys deposited, and ultimately to distribute them in accordance with the average statement. But the bond imposes no obligation to employ an average stater, and it expressly provides that nothing therein contained should constitute the average adjuster who might be employed an arbitrator or his adjustment or statement a final settlement between the parties to the bond. It is difficult to see, then, whence an obligation on the part of the shipowner to have an average statement prepared by an average adjuster residing at Sydney can be derived, or what right the other parties liable to make general average contribution can have to dictate that the shipowner shall employ an average stater residing at a particular place any more than they have to designate the particular person to be employed. It is true that at most ports where adventures terminate or the interests divide, and no doubt at Sydney, professional average

staters of competent skill are to be found, but this is not universally the case. And it is quite conceivable that the shipowner might not be willing to entrust the preparation of the statement to any of the very limited number of average staters who might be found at some of the smaller ports. The most convenient course would doubtless be, in many, perhaps in the majority of cases, to put the matter in the hands of an average adjuster practising his calling at the port of discharge, but this would not always be so. Many cases may however be suggested where it would be to the advantage of all parties that the services of an average stater elsewhere should be engaged.

The learned judges in the Court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds* v. *White*. (1) "The shipper of goods," said the learned judge, "tacitly if not expressly assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous. And by assenting to general average he must be understood to assent also to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." The words relied on are that the shippers must be understood to assent to the adjustment of general average "at the usual and proper place." In their Lordships' opinion, however, these words do not refer to the preparation of an average statement, but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which does not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals

(1) 2 B. & C. 805.

J. C.
1897
WAVERTREE SAILING SHIP COMPANY v. LOVE.

would have to determine whether the owner of the goods was entitled to them and what payment he must make to release them. It would naturally follow, as Lord Tenterden said, that the parties must be understood as consenting to the adjustment according to the law there administered. But all this has, in their Lordships' opinion, nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tenterden's time, professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present.

It was argued that if the shipowner procured the statement by means of an average stater at a distance, shippers might be subjected to much delay and consequent prejudice. Their Lordships do not doubt that the shipowner must act reasonably, and that if, owing to his taking an unreasonably long time in presenting his general average statement, other parties are prejudiced and suffer damage by unreasonable delay, he may incur liability. But no such question arises here. The only matter in issue is whether it can be laid down as a proposition of law that the appellants were bound to employ an average stater at Sydney, and, having failed to do so, are not in a position to insist that the respondents were bound to furnish them with the requisite information pursuant to their contract. In their Lordships' opinion such a proposition cannot be maintained. They will, therefore, humbly advise Her Majesty that the judgment appealed from should be reversed and judgment entered for the appellants, and that the respondents should pay the costs of this appeal and in the Court below.

Solicitors for appellants: *Rowcliffes, Rawle & Co.*
Solicitors for respondents: *Bell, Brodrick & Gray.*

[PRIVY COUNCIL.]

BANK OF NEW SOUTH WALES . . DEFENDANTS; J. C.*

AND 1897

PIPER . . . . . PLAINTIFF. *March* 16, 17; *May* 21.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Law of New South Wales—*11 *Vict. No.* 4, *s.* 7—*Construction—Statutory Offence—Malicious Prosecution—Mens rea.*

By s. 7 of Act 11 Vict. No. 4, a sale of wool under a lien "with a view to defraud," without the written consent of the lienee is made a punishable offence; a like sale of stock is made so independently of a like intent.

In an action for malicious prosecution thereunder, it appeared that the plaintiff had sold stock of which the defendant bank was lienee, without intent to defraud, and with the bank's oral consent:—

Held, that on the true construction of the above section, an intent to defraud was not an element of the statutory offence charged, that this was matter for decision by the judge, and that a verdict must be entered for the defendant.

An intention to offend against the penal provisions of an Act constitutes mens rea; and was proved by the plaintiff's knowledge that there was no written consent.

APPEAL from an order of the Supreme Court (May 11, 1896) whereby a rule nisi, obtained by the appellants for a new trial, or nonsuit, or verdict for the appellants, was discharged with costs. The verdict of the jury was for 1000*l.*

The facts are stated in the judgment of their Lordships.

The case in the Court below is reported in 17 N. S. W. R. Cases at Law, 54.

At the trial, at the close of the respondent's case the appellants' counsel applied for a nonsuit, on the grounds that on the respondent's evidence he was in fact guilty of the offence for which he had been prosecuted; that even if the appellants had given an oral consent to the sale, it was no answer to the charge; that upon the admitted facts there was reasonable and probable cause for the prosecution; and that there was no evidence to go to the jury in support of the respondent's

* *Present:* LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

J. C.
1897
BANK OF NEW SOUTH WALES v. PIPER.

case. The judge, however, declined to nonsuit or direct a verdict for the appellants, but reserved leave to the appellants, if necessary, to move to enter a nonsuit or a verdict for them.

Upon the argument of the rule nisi Darley C.J. and Owen J. held that the preamble to the 7th section of the Act 11 Vict. No. 4, indicates that the crime to be punished is fraud; that the presence of mens rea is necessary to constitute an offence under the section; that although the evidence of verbal authority standing alone would not be allowed to shew the absence of mens rea, such evidence, coupled with the other circumstances, would be admissible; and that the jury had abundance of evidence to shew that the plaintiff, in selling the sheep, had acted with the full knowledge of the bank, and without any intent to defraud. Stephen J. was of opinion that a nonsuit should be entered on the ground that the presence of mens rea was not necessary to constitute an offence under the section.

Joseph Walton, Q.C., Pitcher, Q.C. (New South Wales), and *Clark*, for the appellants, contended that it is an indictable offence under 11 Vict. No. 4, s. 7, for a mortgagor of stock to sell the stock comprised in the mortgage without the written consent of the mortgagee. The oral consent did not save the terms of the Act. Consequently there was as matter of law, depending on the construction of the section, reasonable and probable cause for prosecuting the respondent. The judge ought not to have left that question to the jury. Reference was made to *Sherras* v. *De Rutzen* (1) and *Reg.* v. *Jobson*. (2) Mens rea is proved by shewing an intention to do that which the Act has forbidden. If the bank were wrong in their construction of the Act to the effect that sale of stock by the mortgagor without their written consent was penal, notwithstanding the absence of fraud; still the absence of reasonable cause is not proved where there is an honest mistake as to the meaning of an Act: see *Phillips* v. *Naylor* (3); *Johnson* v. *Emerson*. (4) The following cases were cited on the point whether an action for malicious prosecution would under any

(1) [1895] 1 Q. B. 922.
(2) (1889) 23 Q. B. D. 168.
(3) (1859) 4 H. & N. 564.
(4) (1871) L. R. 6 Ex. 329.

circumstances lie against a corporation such as the appellants, on the ground that a corporation is only liable through its agents, and a principal is not liable for the tort of his agent when it involves mens rea, i.e., malice or fraud or both: *Wilde* v. *Gibson* (1); *Denton* v. *Great Northern Ry. Co.* (2); *Abrath* v. *North Eastern Ry. Co.* (3); *Udell* v. *Atherton* (4); *Barwick* v. *English Joint Stock Bank.* (5) [Their Lordships pointed out that this point was not taken in the grounds of application for a new trial, and therefore was not now open.]

Montague Shearman, and *W. E. Hume Williams*, for the respondent, contended that the findings of the jury upon all the questions submitted to them were right and based upon a right view of the evidence. According to the true construction of the section in question, it has not enacted that the commission of the forbidden act without a mens rea is sufficient to prove the offence charged. At the best the meaning was doubtful, and, accordingly, the Court should look to the nature of the offence, the scope and object of the statute, and the consequences involved. The preamble to s. 7 shews clearly that the crime to be punished is fraud. Even if in the present case it was not necessary for the prosecutor to prove a fraudulent intent, it was at least open to the respondent to disprove that intent, and he did so, and he further shewed that the manager of the bank knew that he had no fraudulent intent. Reference was made to *Reg.* v. *Jobson* (6); *Reg.* v. *Prince* (7); *Sherras* v. *De Rutzen* (8); *Ravenga* v. *Mackintosh.* (9)

Pitcher, Q.C., replied.

1897
May 21.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this appeal was brought by the respondent against the appellants for falsely and maliciously and without reasonable or probable cause making a charge against him before a justice of the peace, upon which

(1) (1848) 1 H. L. 605.
(2) (1856) 5 E. & B. 860.
(3) (1886) 11 App. Cas. 247.
(4) (1861) 7 H. & N. 172.
(5) (1867) L. R. 2 Ex. 259.
(6) 23 Q. B. D. 168.
(7) (1875) L. R. 2 C. C. 154.
(8) [1895] 1 Q. B. 922.
(9) (1824) 2 B. & C. 693.

J. C. 1897 BANK OF NEW SOUTH WALES v. PIPER.

he was summoned to appear at the police court at Cowra in New South Wales, and was committed for trial at the court of quarter sessions at Cowra. Afterwards the Attorney-General refused to prosecute. The defendants pleaded not guilty. The trial took place in March, 1895, before Simpson J., when the jury found a verdict for the plaintiff for 1000*l.* damages. On May 7, 1895, a rule nisi for a new trial or for a nonsuit or verdict for the defendants, pursuant to leave reserved at the trial, was granted by the Supreme Court. On May 11, 1896, the rule was discharged by the Chief Justice and Owen J., Stephen J., the third judge, dissenting.

The appellants are a banking company incorporated in the Colony of New South Wales by Act of Parliament and Deed of Settlement. The respondent is a farmer and grazier residing near Cowra. By a deed of mortgage dated February 29, 1892, the respondent assigned to the appellants by way of mortgage 2050 sheep, ninety-five head of cattle, and twelve horses, as a collateral security for credit advances and accommodation to the extent of 250*l.* in account current which the bank had agreed to grant to him. The mortgage was duly executed and registered in accordance with the provisions of the Act 11 Vict. No. 4. Sect. 7 of that Act is as follows :—

"And whereas it is expedient with a view to increase the public confidence in the validity of such preferable liens on wool and mortgages of live stock to surround them with the penal provisions necessary for the punishment of frauds Be it enacted that any grantor of any such preferable lien on wool or of any mortgage of sheep cattle or horses and of their increase and progeny under this Act whether such grantor shall be principal or agent who shall afterwards by the sale or delivery of the wool under any such lien without the written consent of the lienee to any purchaser pawnee or other person or by selling steaming or boiling down or causing to be sold steamed or boiled down without such written consent as aforesaid the sheep whereon the same shall be growing with a view to defraud such lienee of such wool or of the value thereof or who shall after the due execution and registry of any such mortgage without the written consent of the mortgagee thereof

sell or dispose of or steam or boil down or cause to be sold and disposed of or to be steamed or boiled down any sheep cattle or horses or their increase or progeny or who shall in any way or by any means whatsoever or howsoever directly or indirectly destroy defeat invalidate or impair or any other person or persons who shall wilfully and knowingly incite aid or abet any such grantor directly or indirectly to defeat destroy invalidate or impair the right of property of any lienee in the wool of any sheep mentioned and described in any such registered agreement as aforesaid or the right of property of any such mortgagee as aforesaid in any sheep cattle or horses or their increase and progeny mentioned in any mortgage duly executed and registered as aforesaid under the provisions of this Act shall be severally held and deemed guilty of an indictable fraud and misdemeanour and being thereof duly convicted shall be severally liable in the discretion of the judge or Court before whom any such offender shall be so convicted to fine or imprisonment or to both fine and imprisonment for any period not exceeding three years with or without hard labour at the discretion of such Court or judge."

In May, 1893, whilst the mortgage was subsisting, and the respondent was indebted thereon to the appellants in about 240*l.*, the respondent, without their written consent, sold and delivered to one Robert Philip King 645 sheep and a number of cattle, part of the sheep and cattle included in the mortgage. On November 3, 1893, James Thomas Evans, the manager of the bank at Cowra, swore an information under s. 7 before a justice of the peace that the respondent on or about May 19, 1893, without the written consent of the bank, sold and disposed of the sheep and cattle to King. Upon this information the respondent was brought before the justice of the peace and committed for trial, but the Attorney-General, as already stated, refused to file a bill against him. The action was then brought.

At the trial the respondent admitted the execution and registration of the mortgage and the sale to King, and did not suggest or set up that at the time of the sale he had or believed himself to have the written consent of the appellants or their

J. C.
1897
BANK OF NEW SOUTH WALES v. PIPER.

manager to the sale; but he swore that before the sale he obtained the verbal consent of Evans to it. At the close of the respondent's case the appellants' counsel applied for a nonsuit on the ground that on the respondent's evidence he was in fact guilty of the offence with which he had been charged, and that even if it were proved that the appellants had given a verbal consent to the sale, it would afford no answer to the charge; and that, therefore, upon the admitted facts there was reasonable and probable cause for the information and charge. The learned judge declined to nonsuit, but reserved leave to the appellants to move to enter a nonsuit or a verdict for them. Evans was then examined as a witness for the appellants. He denied that he gave the respondent any authority orally or in writing to make the sale to King; but the jury, in answer to the first question put to them by the learned judge, found that Evans did verbally authorize the sale. That must therefore be taken as the fact. Two other questions were submitted to the jury, one being: "Did Evans entertain an honest belief that the plaintiff was guilty of the offence charged in the information, and, if so, was his belief founded on such reasonable grounds as would lead an ordinarily prudent and cautious man placed in the position of Mr. Evans to the conclusion that the plaintiff was probably guilty of the offence?" and the other: "Did Evans honestly believe that the plaintiff, having sold and disposed of certain sheep and cattle, covered by the mortgage to the bank, without written authority, although he may have had verbal authority, was guilty of an indictable offence under 11 Vict. No. 4, s. 7, and, if so, was his belief founded on such reasonable grounds as would lead a fairly cautious and prudent man in the position of Mr. Evans to entertain such belief?" To both these questions the jury answered "No."

The decision of the question whether there was reasonable or probable cause for the charge depends upon the construction of s. 7. It was for the judge to decide that question, as a matter of law, upon the facts admitted or found by the jury. It is to be observed that in the first part of s. 7, which relates to the sale or delivery of wool that is under a lien, the words "with a

view to defraud" are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged these words are omitted. This cannot be considered to be an unintentional omission unless it is shewn to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words "with a view to defraud" had been inserted in this part of it. They cannot alter the offence created by the statute by the introduction of words which the Legislature has omitted.

It was certainly competent to the Legislature of New South Wales to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial, and the question is whether in the case of the sale by the mortgagor it has not done so. The enactment in this part of s. 7, according to the ordinary meaning of the words, appears to their Lordships to provide that the selling without a written consent shall be punished, as if it were a fraud. In their Lordships' opinion neither the preamble to the 7th section nor the enactment that the persons offending shall be held and deemed guilty of an indictable fraud justifies the opinion that an intent to defraud must be implied, or that it is open to the person charged to give evidence to rebut the presumption of fraud. It is the intention of the Legislature to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence. It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory, there must be mens rea on the part of the accused, and that he may avoid conviction by shewing that such mens did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and

J. C.
1897
BANK OF NEW SOUTH WALES v. PIPER.

reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of *Sherras* v. *De Rutzen* (1), where the conviction of a publican for the offence of selling drink to a constable on duty was set aside by the court because the accused believed and had reasonable grounds for the belief that the constable was not on duty at the time is an illustration of its absence. The circumstances of the present case are far from indicating that there was no mens rea on the part of the respondent. He must be presumed to have known the provisions of s. 7, whether he was actually acquainted with its terms or not. Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as mens rea. If the offence of which the offender is convicted is a venial one, the Act puts it within the discretion of the judge who tries the case to award a nominal punishment. At the end of the defendants' case the learned judge ought to have ruled that, there being no written consent, there was reasonable and probable cause for making the charge in the information, and he should have directed the jury to find a verdict for the defendants. The questions which were submitted to the jury were unnecessary, and ought not to have been submitted. Their Lordships will therefore humbly advise Her Majesty to discharge the order of the Supreme Court, and to order the rule to enter a verdict for the defendants to be made absolute with costs. The respondent will pay the costs of this appeal.

Solicitors for appellants: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

(1) [1895] 1 Q. B. 918.

[PRIVY COUNCIL.]

OWNER OF THE S.S. "KWANG TUNG" PLAINTIFF;

AND

OWNERS OF THE S.S. "NGAPOOTA". DEFENDANTS.

THE "NGAPOOTA."

J. C.*
1896
Nov. 18;
1897
May 22.

AN APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Art. 18 *of the Regulations for Preventing Collisions at Sea—Reasonable Delay.*

Art. 18 of the Regulations under the Merchant Shipping Act, which says, "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is sufficiently complied with though a delay of a few seconds has occurred.

The Court is not bound to hold that compliance must be made the very moment when danger becomes apparent.

The Emmy Haase, (1884) 9 P. D. 81, approved.

APPEAL from a decree of the Supreme Court (June 5, 1895) reversing a decree of Law J. (Sept. 10, 1894), and pronouncing both vessels to blame for the collision in question. Law J. had held the *Ngapoota* alone to blame; the Court of Appeal held that the *Kwang Tung* was also to blame for not having stopped and reversed immediately on seeing the three lights of the *Ngapoota* a second time.

The facts are stated in the judgment of their Lordships.

Sir W. Phillimore, Q.C., and *Maurice Hill*, for the appellant, contended that the engines of the *Kwang Tung* were stopped and reversed as soon as it was or ought to have been apparent that the *Ngapoota* was manœuvring so as to cause risk of collision. At all events, the master of the *Kwang Tung* exercised his judgment, and stopped and reversed as promptly as it was his duty to do. Reference was made to art. 18 of the Regulation of 1884; *Wilson, Sons & Co.* v. *Currie* (1) [LORD WATSON referred to the *Emmy Haase* (2)]; *The Khedive.* (3)

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

(1) [1894] A. C. 116. (2) 9 P. D. 81.
(3) (1880) 5 App. Cas. 876.

J. C.
1897
OWNER OF THE S.S. "KWANG TUNG" v. OWNERS OF THE S.S. "NGAPOOTA."
THE "NGAPOOTA."

Aspinall, Q.C., and *Butler Aspinall*, for the respondents, contended that the *Kwang Tung* neglected when risk of collision was involved to slacken her speed or stop and reverse, or to do so in due time. Reference was made to *The Stanmore* (1); *The Arratoon Apcar*. (2)

Hill, replied.

1897. May 22. The judgment of their Lordships was delivered by

LORD MORRIS. The *Kwang Tung* and *Ngapoota* were two small local steamers plying locally. About 12.40 A.M. on April 24, 1894, the *Kwang Tung* was on a voyage from Penang to Teluk Anson in the Straits of Malacca, and was steering at the rate of nine knots an hour. The *Ngapoota* was coming in the opposite direction on a voyage from Teluk Anson to Penang, and when about fifteen miles north-west of Tanjong those on board the *Kwang Tung* observed the *Ngapoota* between three and four miles off. The appellant alleged the vessels were end on. The respondents alleged they were green to green. The case occupied several days at hearing before Law J. in the Court of Penang, and he finds that the account given of the matter on behalf of the owner of the *Kwang Tung* is the true one. That account is, that when the ships got within one and a half miles of each other the green light of the *Ngapoota* was closed in, and that when within about half a mile of each other the three lights of the *Ngapoota* became visible, that immediately Captain Cobb of the *Kwang Tung* put his helm hard to port, blew his whistle, and shouted to the *Ngapoota* to port, but that seeing the *Ngapoota* swinging round he gave orders to stop and reverse, that the engines were reversed and going astern so that the rate of the *Kwang Tung* was reduced to about seven knots at the time the collision took place, that the cause of collision was the improper starboarding by the *Ngapoota*, and that vessel was condemned by the learned judge as the sole cause of the collision.

The case came on appeal before the Chief Justice and Leach J. in the Court of Appeal. They affirmed the decision

(1) (1885) 10 P. D. 134. (2) (1889) 15 App. Cas. 37.

of Law J. on the facts of the case, and held that the *Ngapoota* was to blame for the collision; but they held as a matter of law that the *Kwang Tung* had disobeyed art. 18 of the Regulations under the Merchant Shipping Act, and consequently was also thereby in default. Art. 18 of the Regulations says: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary."

Their Lordships are of opinion that the case does not turn on any question of law, but depends on matters of fact, whether on the evidence the captain of the *Kwang Tung* had complied with rule 18. Their Lordships concur in the principle laid down by Butt J. in the case of *The Emmy Haase* (1), namely, that compliance with rule 18 at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously—a short, but a very short, time must be allowed him for this purpose.

In the present case, when the ships were at a distance of about half a mile as Captain Cobb estimated, at a less distance in the opinion of Law J., the *Ngapoota* shews green lights and shuts in the red; but even then, if the *Ngapoota* had continued her course, there would have been no collision; but when, observing the wavering course of steering of the *Ngapoota*, Captain Cobb put his helm hard to port, blew his whistle, and shouted to those on board the *Ngapoota* to port, and then gave orders to stop and reverse, the only fault alleged to have been committed by Captain Cobb is that he did not give the order to stop and reverse soon enough. At the rate the ships were proceeding a minute and a half at most would cover the distance between the ships from the time the three lights of the *Ngapoota* came into view to the *Kwang Tung*. Law J. considered the distance was less than half a mile, and that consequently the interval of time was less than a minute and a half and was within a minute. The case therefore turns on seconds of time. Their Lordships have been advised by their assessors

(1) 9 P. D. 81.

J. C.
1897
OWNER OF THE S.S. "KWANG TUNG" v. OWNERS OF THE S.S. "NGAPOOTA."
THE "NGAPOOTA."

and are of opinion that under the circumstances Captain Cobb rightly manœuvred. The period within which the engines could be stopped after an order given to stop would be twenty to thirty seconds, and as they had been stopped and reversed the delay alleged as a fault could not have been more than a few seconds. This delay their Lordships are of opinion was not a faulty delay, the time being occupied in giving proper directions.

Their Lordships in result have on the evidence arrived at the conclusion that the captain of the *Kwang Tung* did obey art. 18 of the Regulations as to stopping and reversing, and they approve of the judgment of Law J. Their Lordships will therefore humbly advise Her Majesty that the judgment of the Court of Appeal should be reversed in so far as it holds the *Kwang Tung* partially to blame for the said collision, and that the judgment of Law J. should be restored. The respondents are to pay to the appellant the costs of both Courts and of this appeal.

Solicitors for appellant: *Rowcliffes, Rawle & Co.*
Solicitors for respondents: *Talbot & Tasker.*

Followed. EDWARDS v. EDWARDS [1950] P. 8

Applied. LAUDER v. LAUDER [1949] P. 277

[HOUSE OF LORDS.]

EARL RUSSELL (CROSS APPEAL) . . . APPELLANT; H. L. (D.) 1897 July 16.

AND

COUNTESS RUSSELL . . . . . RESPONDENT.

Judicial Separation—Cruelty—Matrimonial Causes Acts, 1857 (20 & 21 *Vict.* c. 85, s. 22) *and* 1884 (47 & 48 *Vict.* c. 68).

A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation :—

So *held*, by the majority of the House of Lords (Lords Herschell, Watson, Macnaghten, Shand, and Davey: Lord Halsbury L.C., Lords Hobhouse, Ashbourne, and Morris dissenting).

The effect of the Matrimonial Causes Act, 1884, debated, but not decided.

APPEAL from a decision of the Court of Appeal. (1)

The facts are fully given as follows by Lord Hobhouse.

"The facts which led up to the still pending litigation between the Earl and Countess Russell in the Divorce Court admit of being stated in a moderate compass. The parties were married in February, 1890. Soon after the marriage they disagreed, and separated for a while. Then they lived together again till June, 1890, when they separated for the second time. Since that time they have never lived together.

"On November 28, 1890, the Countess presented a petition praying a judicial separation from the Earl on the ground of his cruelty. She filed particulars in January, 1891, and there made allegations importing that the Earl had been guilty of an odious crime in concert with one Mr. R. At the hearing of the petition on December 4 this charge was completely refuted, and it was withdrawn by Sir Edward Clarke, the Countess's counsel. The jury acquitted the Earl of all the charges of cruelty, and the petition of the Countess was dismissed with costs.

(1) [1895] P. 315.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

"On December 8, 1891, there was published in a newspaper called *The Hawk* a statement made by the Countess to the editor, the gist of which was, that she had in her possession letters from the Earl's relations supporting her charge, and that she did not produce them at the trial partly out of regard for his family, partly from misapprehension of the course of the proceedings.

"On March 8, 1892, the Countess commenced a written correspondence with the Earl proposing a meeting. They never did meet, except once, accidentally, at a railway station; but the correspondence continued down to December 16, 1892, when the Earl refused to continue it, because the Countess refused to withdraw charges which he said she knew to be infamous and false.

"The correspondence may be summarised as follows: On the Earl's side, he welcomed the overture of the Countess as 'the first signs of sorrow for the cruel wrong you have done me.' He intimated a forgiving temper, but required her to state that she now disbelieved in her charges, and was sorry to have made them. If she would do that, he offered to meet her at the office of Mr. Doulton, his solicitor. [See letters of March 11 and 19.] He refused then to make her an allowance for which she asked, partly on account of the expense she had caused him, and of claims she was still making, but mainly on account of her practical reassertion in *The Hawk*, and her continuance of, the charges which had been found to be false. To those positions the Earl steadily adhered.

"The Countess, on her part, said at first that people had poisoned her mind. But she persistently evaded either retraction or apology. On the contrary, as the correspondence proceeded, she dwelt more and more upon her charges, and upon the evidence in her hands, and upon her determination to bring them into publicity if sufficient provision was not made for her (April 16, 1892). She alleged (April 8, 1892) that the people who poisoned her mind were the Earl's relations, and that she had their letters in her hands, and that she would not apologise till they came forward to explain them. She wrote to the Earl's uncle, Mr. Rollo Russell (April 29), saying that she had

kept his letters back at the trial because he, with others, begged her not to repeat what they had said of the Earl. She added: "But the time has now arrived when I must protect myself and vindicate my character in the eyes of the world. There are two things to be done: either that you all recognise me publicly, or that I make all the family letters public for the world to draw its own conclusions."

"On December 13 she wrote to the Earl saying that she had a sworn affidavit about Mr. R. which would shew that no responsibility rested with her; also that she had detectives' reports, meaning detectives by whom the Earl was being watched, and that she ought not to be asked to apologise till the Earl had seen those things, and had given a full explanation of all he had been accused of. She wrote: 'Before seeing you I quite meant something should be done, and thought the best plan would be to get a newspaper to print all the documents I hold in a pamphlet, and then, if the world thought an apology was due, to publicly apologise . . . . I might word the thing in this way, saying you refused to see me or support me till I apologise; then print everything to shew my reasons for believing you guilty; then, if the world thought I owed you an apology, to do it most willingly.' On December 29 she wrote to the Earl's uncle, Mr. Lyulph Stanley, to the same effect.

"Such was the condition of affairs when the present litigation began. On April 6, 1894, the Countess brought a suit in the Divorce Court, praying for restitution of conjugal rights. That was met by the Earl's counter-demand for judicial separation on the ground of her cruelty. Soon after the opening of the case the Countess's counsel, Mr. Murphy, informed the Court that he was instructed to say that the Countess was satisfied that her charges about Mr. R. were without foundation, but that her belief in it was excused because she had written materials and letters in her possession. In the course of the evidence, however, it turned out that the Countess had not, and never had, any of the materials which, through *The Hawk*, she invited the public to believe that she had to convict the Earl, and which she repeatedly insisted on as her justification during the year 1892—not a letter, nor an affidavit, nor a detective's

H. L. (D.) 1897 RUSSELL v. RUSSELL.

report, nor any incriminating statement from any of the Earl's relatives. Her only pretence of justification was a letter of a very shameful character written to her by Lady Cardigan as far back as the year 1890, before the first trial, conveying imputations against the Earl which have been denied and disproved. In short, the Countess's representations of her case for charging the Earl with crime, from December, 1891, when she used the editor of *The Hawk*, down to January, 1893, when she last wrote to Mr. Stanley, were a series of falsehoods, not abandoned till the present case was in course of trial.

"Pollock B., who tried the case, instructed the jury that the Countess was entitled to a decree for restitution unless the Earl established a case of cruelty against her, and he put to them two questions. The first was, whether the Countess's conduct amounted to cruelty. The second was, whether she had brought her charges since the first trial in good faith. On the question of cruelty he explained to the jury the doctrine of Lord Stowell in *Evans* v. *Evans* (1), pointing out that the criterion of danger was not alleged to cover all possible cases of cruelty; and that Lord Stowell could not 'have had in his mind a case where either husband or wife was notoriously, openly, from week to week, from month to month and from year to year, raising a charge against the other of the commission of a horrible offence, and that almost habitually.' He stated 'the precise ground on which cruelty was alleged; not simply that she filed that petition and gave evidence in respect of it; the complaint against her is that from that time, after the trial, although she had heard the verdict in favour of her husband at the close of the trial, that she thenceforth wrote letters, made statements, pursued her husband, practically insisted on the same charge . . . . not by one single act or one single letter, but by a continuance and persistence in conduct of that sort' (Printed papers, p. 351, C). The jury found that the Countess had been guilty of cruelty.

"On the second question the learned judge asked the jury to say whether the Countess did the acts in question honestly believing that she was making a charge that was true, or

(1) (1790) 1 Hagg. Cons. 35.

whether she did them not honestly believing that they were true, but for some ulterior purpose (Printed papers, p. 349, F). On this the jury found that in her conduct and correspondence subsequent to the first trial she did not act bonâ fide.

"On these findings the Court pronounced a decree of judicial separation. The Countess then moved the Court of Appeal to set aside that decree and to enter a decree for her. On this appeal the learned judges have differed in opinion. Lopes and Lindley L.JJ. defined cruelty thus: 'There must be danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it.' For brevity's sake, I refer to this definition afterwards as the doctrine of danger. Then, after carefully examining the authorities, the learned judges held that there was no evidence of legal cruelty which ought to have been left to the jury, and therefore the Earl was not entitled to a decree for judicial separation.

"Then came the question whether the Countess was entitled to a decree for restitution. The learned judges examined the authorities minutely to ascertain whether in the Ecclesiastical Courts there was any middle course between granting a decree for restitution or granting one for separation. And they found that, notwithstanding some startling results, there was none, and that such was the settled law down to the Divorce Act of 1857. After that Act it was urged that, as a new ground for separation and a new practice had been created, there was now a middle course. But Sir C. Cresswell held otherwise, saying that it would be very dangerous to introduce a new rule: *Burroughs* v. *Burroughs*. (1)

"But then the learned judges held that, indirectly, the legislation of 1884 (2) has given to the Court a power to refuse a decree for restitution which it had not got before. In 1857 desertion without cause was introduced as a ground for judicial separation. In 1884 failure to obey a decree for restitution was made equivalent to desertion without cause. It is impossible to say that the Earl has deserted his wife without cause. But if a decree of restitution was made, and he failed to comply with it,

(1) (1861) 2 Sw. & Tr. 303; 30 L. J. (P. & M.) 186.

(2) The Matrimonial Causes Act (47 & 48 Vict. c. 68).

H. L. (D.) 1897 RUSSELL v. RUSSELL.

the law would compel the Court to say that. Therefore, they held that they were relieved from the necessity of making such a decree.

"Rigby L.J. held that legal cruelty had been established; but as the rest of the Court thought otherwise, the Earl's petition for separation was dismissed. The Countess's petition for restitution was also dismissed. Both parties appealed from this decision. The appeal of the Countess has been withdrawn, so that her claim to restitution has been finally decided in the negative. The Earl's appeal now stands for decision."

It is of importance to state that the Countess lodged her appeal on September 7, 1895, against the decision of the Court of Appeal delivered on August 7, 1895. The House was sitting for judicial business in November, 1895. The Earl lodged his cross-appeal against part of the same decision on November 12, 1895. The Countess withdrew her appeal and petitioned the House, first, that the Earl's cross-appeal was out of time; secondly, that it fell with the original appeal; and, thirdly, an alternative that if the cross-appeal was allowed to proceed the Earl should give security for costs. On March 24, 1896, the Appeal Committee (Lords Watson, Macnaghten, Morris, and Davey) allowed the cross-appeal to proceed as if it were an original appeal on the Earl giving the usual security for costs as in an original appeal. Subsequently, on April 21, 1896, the Countess lodged a cross-appeal and asked the House to either allow her cross-appeal to proceed or to restore her original appeal. On May 21, 1896, the Appeal Committee held the cross-appeal was too late and they declined to restore the abandoned appeal, one ground being that an appeal to the House of Lords from the Court of Appeal in a divorce cause must be brought within one month from the date of the decision appealed from: Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9; *Cleaver* v. *Cleaver*. (1)

1896. June 29, 30; July 2, 14. *Sir Robert Reid, Q.C.*, and *Robson, Q.C.* (with them *Bargrave Deane, Q.C.*), for the appellant. There was ample evidence of legal cruelty on the part of

(1) (1884) 9 App. Cas. 631.

the respondent to warrant a decree for judicial separation. Nothing more frightful can be imagined than the position of a man charged with such an offence as that imputed to the appellant. The jury were of opinion that the respondent was making charges which she had concocted and which she did not believe; that she never did believe them, and that there was no pretence for making them. The explanation given at the trial and all through was that she wanted the appellant to give her a larger allowance. She said she had some incriminating documents which she could use to support her charge, but it turned out she had nothing of the kind. Nor was there any attempt on the part of her counsel to suggest there was any foundation for the charge: they withdrew the whole of it. Yet after that the respondent repeats the accusation and threatens to publish it to the world. Cruelty, as in the case of fraud, cannot be defined by exact definition, but statements can be found as to the elements constituting it in a particular case. The Court is to proceed on the principles and rules on which the Ecclesiastical Courts acted before 1857 (20 & 21 Vict. c. 85), s. 22. The cases are not at all in accord, but they establish on the whole that it is not possible to lay down an exhaustive definition; that the decisions should be looked at as illustrations each depending on its own facts. Some negative limitations may be derived from the cases; that danger is the ground upon which the Court has generally acted; that this danger may consist not merely of the apprehension that the accused person may inflict bodily injury, but also that he may provoke the other spouse to commit cruelty. Mere insult not of an aggravated character must be treated as being an incident of matrimony. But other insults, such as spitting in the wife's face, or leading strangers to treat her as a prostitute, have been held to be gross insult and legal cruelty. These rules are the same for husband and wife; and an element in considering the question in each case is the effect that the conduct imputed must have upon the possibility of the matrimonial duty being discharged. The principle is that cruelty consists of the wilful infliction of bodily or mental pain, and the Courts will not wait until a person suffers before they find

H. L. (D.) 1897 RUSSELL v. RUSSELL.

cruelty, the apprehension of injury being enough. But in order to found an application for relief in matrimonial cases the conduct must be grave in degree. Further, there is no legal limitation to the character of the cruelty, but the Courts will consider as an important element of the conduct in question whether it is likely to produce injury to health; or whether it is calculated to make the discharge of matrimonial duties practically impossible or unendurable. In *Holmes* v. *Holmes* (1), a case before *Evans* v. *Evans* (2), the outrage was of the worst possible character, namely, a threat made by the husband in the presence of his wife and two men that he would there and then have connection with her. It was said the threats there were only words. But suppose the case of a woman of high principle being treated in that way. She might say, "I am not going to say my health has been injured, I have too much contempt for the person of whose conduct I am complaining, but this is what I have suffered." Then comes *Evans* v. *Evans* (2), the leading authority on this subject. That was a wife's petition against the husband, and Lord Stowell found, as Lord Brougham found in *Paterson* v. *Paterson* (3), that the allegations were not proved; but Lord Stowell intimated that there were exceptional cases, and that the Court could in special cases go beyond injury or apprehension of injury to bodily health, life, or limb: see the quotation given in Lord Herschell's opinion. (4)

[LORD WATSON mentioned *Montgomery Moir of Leckie* v. *Lady Leckie* in this House in 1751. (5)]

In *Popkin* v. *Popkin* (6) Lord Stowell said the attempt of the respondent to debauch his own female servants was a strong act of cruelty; perhaps not alone sufficient to warrant a divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. Now, in the Court of Appeal it was said that *Evans*

(1) (1755) 2 Lee, 116.

(2) 1 Hagg. Cons. 35, at pp. 37, 38, 39, 40.

(3) (1850) 3 H. L. C. 308; 7 Bell's App. 337.

(4) Post, p. 445.

(5) 1 Elchies' Dec. H. & W. No. 35, and vol. ii. p. 193; 6 Pat. App. 687.

(6) (1794) 1 Hagg. Ecc. 765, 768.

v. *Evans* (1) must be treated as an authority for the proposition that there must be injury to life or limb or health; but if Lord Stowell meant that he would not have decided as he did in *Popkin* v. *Popkin*. (2) In *D'Aguilar* v. *D'Aguilar* (3) Lord Stowell said that nothing could be grosser cruelty than spitting upon the wife. *Oliver* v. *Oliver* (4) was a husband's suit for restitution of conjugal rights. The wife pleaded cruelty; but Lord Stowell said words of present irritation, however reproachful, would not enable the Court to pronounce a sentence of separation. In *Durant* v. *Durant* (5) the wife sued for a divorce à mensâ et thoro on the ground of the husband's adultery; the defence was condonation. In reply, the wife set up that the husband had turned her out-of-doors in the face of her neighbours, her family, and her twelve children, under a charge of criminality with her children's tutor. Sir John Nicholl said, on the question of condonation and subsequent conduct: "Here is not cruelty which would support a sentence propter sævitiam; but here is an act which might be pleaded as such with other circumstances. If a person who had ill-treated his wife and had been guilty of acts of violence and words of menace had finally made a charge of misconduct and criminalty which he had not attempted to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty. By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect which it is unnecessary again to state. These Courts and the law of this country have not gone the length of recognising it as a substantive ground; but it is a fact among others per quod consortium amittitur." *Westmeath* v. *Westmeath* (6) was a husband's suit for restitution of conjugal rights. Legal cruelty had been condoned, and with regard to subsequent acts the

(1) 1 Hagg. Cons. 35, at pp. 37, 38, 39, 40.
(2) 1 Hagg. Ecc. 765, 768.
(3) (1794) 1 Hagg. Ecc. 773.
(4) (1801) 1 Hagg. Cons. 361.
(5) (1825) 1 Hagg. Ecc. 733, at pp. 769, 770.
(6) (1826) 2 Hagg. Ecc. Supp. at pp. 56, 61, 131.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

Court required proof of "apprehension of injury, as it may affect the safety or health of the person." *Bray* v. *Bray* (1) was a wife's cause for divorce by reason of cruelty. The question arose on the admissibility of certain additional articles in which she pleaded that her husband had accused her of incest with her uncle. Sir John Nicholl said: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife." In *Neeld* v. *Neeld* (2) Dr. Lushington wrongly confined the definition to bodily injury of any kind, and, secondly, to threats exciting a fear of personal injury; which was inconsistent with *Evans* v. *Evans*. (3) *Dysart* v. *Dysart* (4) was a husband's claim to restitution of conjugal rights; but the petition was met by a charge of cruelty which on appeal was sustained. *Furlonger* v. *Furlonger* (5) was the husband's suit against the wife because of her cruelty, and the same rule of necessary protection from danger or apprehended danger to life or limb was most explicitly enunciated by Dr. Lushington. In *Paterson* v. *Paterson* (6) Lord Brougham stated that the law was the same in Scotland as in England, and on that ground reversed that part of the Lord Ordinary's interlocutor which set forth that actual personal violence, or the immediate menace of it, was the only ground for separation. Lord Brougham, agreeing that the allegations of the wife had not been proved, reversed the decision of the Inner House; but said: "The husband uttering constant insults, vituperation, scornful language, charges of gross offences (utterly groundless), charges of this kind made before her family, her children, her relatives, her friends, her servants, insulting her in the face of the world and of her own domestics, calling upon them to join in those insults and to treat her with contumely and with scorn: if such a case were to be made out, or even short of such a case, namely, injurious treatment which would make

(1) (1828) 1 Hagg. Ecc. 163–7. The original papers were obtained for the House. Mrs. Bray dying, the suit abated.

(2) (1834) 4 Hagg. Ecc. at p. 265.

(3) 1 Hag. Cons. 35.

(4) (1844–7) 3 N. of C. 324; 5 N. of C. 194.

(5) (1847) 5 N. of C. at p. 425.

(6) 3 H. L. C. 308, at p. 328; 7 Bell's App. 337.

the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce à mensâ et thoro to a case such as I have put." In *Gale* v. *Gale* (1), the wife claimed a divorce on the ground of cruelty. The libel consisted of twenty-five articles, and among the charges was one that the husband, three days after his marriage, accused the petitioner with having, previous to their marriage, committed incest with her step-father. There is no doubt that that case, so far as it goes, is against the appellant, as there Sir John Dodson considered the charge made by the husband was not per se sufficient to constitute legal cruelty. In *Tomkins* v. *Tomkins* (2) the wife alleged personal violence. Sir Cresswell Cresswell read *Evans* v. *Evans* (3) to the jury, and said: "There must, however, be bodily hurt, not trifling or temporary pain; or, a reasonable apprehension of bodily hurt. It will be for you, on a consideration of the evidence, to determine whether the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health. It is for her to make out the affirmative of what she alleges." But the learned judge did not intend to lay down any cast-iron definition; For see *Milner* v. *Milner*. (4) There the wife petitioned for dissolution of the marriage on the ground of cruelty and adultery. The grounds of cruelty were as follows: The respondent in a quarrel struck the petitioner with a slipper upon her back, and in that same year he struck her across the shoulders with a leather strap. On another occasion, when they were staying in the house of a friend in London, the petitioner insisted on accompanying the respondent against his will. When they got to Fenchurch Street he said she should go no further, and, taking her by the shoulders and making use of the most filthy language, he pushed her against

(1) (1852) 2 Rob. Ecc. 421.
(2) (1858) 1 Sw. & Tr. at p. 172.
(3) 1 Hagg. Cons. 35.
(4) (1861) 31 L. J. (P. & M.) 159; 4 Sw. & Tr. 240.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

the wall, and thrust his umbrella against her person. The blow inflicted no pain, but in consequence of his conduct a man passing at the time took her for a prostitute and seized hold of her leg. She returned to the friend's house, and lived with her husband for a month. There Sir Cresswell Cresswell said: "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated. It is a case of the grossest and most abominable cruelty, and, combined with the adultery, entitles the petitioner to a decree of dissolution." That, fairly taken, means that the indignity, the contumely, the insult, the outrage, the wounded feelings of this woman were the ratio decidendi of that case: see also *Curtis* v. *Curtis*. (1) Then in *Cousen* v. *Cousen* (2) Sir J. P. Wilde (Lord Penzance) held that indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse without personal violence or words of menace, do not amount to legal cruelty, although the husband carries on an adulterous intercourse with a servant under the same roof where he is residing with his wife. In *Pickard* v. *Pickard* (3) the cruelty of the wife consisted in unrestrained violence, irritability on the slightest occasion, bursts of uncontrolled temper, and, in the fact that, although she did not inflict bodily injury, she raised her hand against her husband, and wished to rule his conduct by personal attack. She thrust herself before him on the steps of a public chapel, the service of which he was attending, assailed him with abuse and blows, and, as the sole refuge from an unseemly struggle, drove him in ignominy home. Cohabitation on the terms of the marriage contract ceasing to be longer possible, but, more than all, there being the danger of the man being incited to retaliate, and there being no security for the safety of the wife herself, a separation was granted. In *Milford* v. *Milford* (4)

(1) (1858–9) 1 Sw. & Tr. 192; 4 Sw. & Tr. 234.
(2) (1865) 34 L. J. (P. & M.) 139; 4 Sw. & Tr. 164.
(3) (1864) 33 L. J. (P. & M.) 158.
(4) (1866) L. R. 1 P. & D. 295, 299.

Lord Penzance said the grounds of the Court's interference are regard for the wife's safety and the impossibility of her fulfilling the duties of matrimony in a state of dread. In *Forth* v. *Forth* (1) a judicial separation was granted on the ground of the wife's cruelty, although the parties had continued to live together in the same house until the hearing. There it was decided that the question is not simply whether the husband's safety is endangered; but the Court also considers the interests of the wife having regard to the risk of retaliation. That case throws light upon the possibility of the continuance of matrimonial relations. Surely to disturb the peace of the parties, and to make it in the highest and last degree impossible that they could ever live together as husband and wife, is an act of cruelty.

[LORD WATSON. You are entitled to say that the Courts both in this country and in Scotland, in considering what protection is required will consider the conduct of both spouses, and not only that of the offending spouse. *Kelly* v. *Kelly* (2), decided by Lord Penzance, goes as far as any case before *Paterson* v. *Paterson* (3) in one direction, namely, that moral tort combined with injury to the health is sufficient without any act of violence.]

Yes; that is, if force, whether physical or moral, is systematically practised for a length of time to compel submission so as to injure health: that is enough. *Kelly* v. *Kelly* (2) was a case of insistence on the part of the husband. It was not a case of violence; but the case there put was injury to the lady's health, and, that being ascertained, the insistence was a ground of separation. In *Mytton* v. *Mytton* (4), Butt J. held that a course of harsh irritating conduct unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after resumption of interrupted cohabitation, was enough to constitute legal cruelty.

The above cases shew that there has been reserved a loophole for exceptional cases, and this is one of those exceptional cases. That is the appellant's whole point: that the Court would say—

(1) (1867) 36 L. J. (P. & M.) 122.
(2) (1870) L. R. 2 P. & D. 59.
(3) 3 H. L. C. 308; 7 Bell's App. 337.
(4) (1886) 11 P. D. 141.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

"These are the elements you have to consider—danger to health, physical injury, and so forth. But there are exceptional cases." The question is, Do cases like the present come within the category of minor cases of annoyance, or do they not rather come within the class of case Lord Stowell described as making the consortium absolutely impossible? It cannot be doubted that here the performance of the duties of married life is absolutely impossible. Lady Cardigan's letter was received before the first trial, but that letter left the respondent in doubt as to the character of the offence, and did not mention Mr. R.'s name. At the very least, the respondent made the charge against Mr. R. under circumstances entirely destitute of evidence: a charge which the jury held she knew to be false. Then, after all is made clear in December, 1891, by the withdrawal and the verdict of the jury, she reiterates these charges, makes them public, insists on them, and puts forward that she has documents and an affidavit to support the accusation: all of which was false, for there are no documents and no affidavit. On the whole facts the jury in the second trial held there was no bona fides from the very beginning. And it is submitted that this is one of those cases in which the jury were warranted in finding that cruelty had been established. There is no doubt that where the home is not destroyed the Court might say—"To keep these parties together is desirable." But where the conduct is such that the home is at once absolutely destroyed, and that according to ordinary human laws and feelings it would be discreditable for the parties to live together, the Court is justified in saying it will not force them to live together.

Practically, a decree of judicial separation would give the appellant protection against further molestation. It would be a valuable benefit.

[LORD WATSON. Is not a husband who obtains a judgment in his favour as a defendant in a proceeding by the lady for a restitution of conjugal rights in the same position as if he had succeeded in a suit of his own?]

From the point of view of the appellant he would have been liable before the Matrimonial Causes Act, 1884, to have been

sent to prison, if he did not comply with an order to take his wife back. As it is, he is now liable to make her what allowance the Court orders. Pollock B. treated the two questions as convertible, namely, that the same conduct which might prevent the Court ordering Lord Russell to cohabit with his wife would also entitle him to a decree for judicial separation. But the Court of Appeal drew the distinction that the order for restitution of conjugal rights was after all discretionary.

[LORD HERSCHELL. There are some dicta in *Mackenzie* v. *Mackenzie* (1) to the effect that where a party had not so acted as to justify a decree for judicial separation she might, nevertheless, have so acted as to disentitle her to the assistance of the Court.]

If the appellant is not entitled to a decree the result of the respondent's conduct will be to give her liberty and alimony without further trouble.

[LORD SHAND. That has been dealt with in this case, and both parties are bound by it; therefore the hardship in the case of this husband is gone. It has been held that he is not bound to keep her.

LORD HALSBURY L.C. It requires to be considered whether in the state of the ecclesiastical law before 1857 there was any intermediate course, and, if there was no power of granting a separation, whether there was not a duty to order restitution of conjugal rights.]

The value of a judicial separation is that it will prevent her bringing a fresh action for restitution. In the absence of any matrimonial offence she may commence a new action.

[LORD WATSON. She cannot, unless there is a change of circumstances.]

It seems difficult to understand how in the absence of a matrimonial offence the Courts of this country can say, "We will not compel these parties to live together."

[LORD HALSBURY. That will have to be considered when the question arises.]

The appellant asks for a decree because all these proceedings

(1) [1895] A. C. 384.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

have not been bonâ fide. If he obtains a decree the respondent cannot open the matter again.

[LORD HERSCHELL. It is not to be taken as decided and settled in this House that the only answer to a petition for restitution of conjugal rights would be cruelty, or something which would justify a separation.

LORD WATSON. I do not suppose that the law as laid down in *Mackenzie* v. *Mackenzie* (1) is not a good decision. Where in Scotland a woman or a man sues for adherence—this is equivalent to restitution of conjugal rights in England—and the suing spouse does not want to go back and had no intention of doing so, but sues only for a particular purpose, I do not see why that want of bona fides on her part should not be a defence to an action for restitution of conjugal rights. In *Mackenzie* v. *Mackenzie* (1) the husband brought an action for adherence, and he had to prove according to the Scottish law that he was entitled to have his spouse ordered to rejoin his society. The Scottish Courts will never force a man to resume cohabitation. They merely enjoin him to do so, without putting him in gaol for not doing so. If he should keep away for four years, then a fresh action can be brought. That is the only penalty he incurs. The Courts simply issue an admonition; and if the husband is contumacious he does not suffer for it. In England before 1884 a spouse could be sent to prison for disobedience.]

The Matrimonial Causes Act, 1857, s. 26, enacts: "In every case of a judicial separation the wife shall while so separated be considered as a feme sole for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use." Now, that would give the appellant, if he had his

(1) [1895] A. C. 384.

decree, a legal security, or it may be called a pecuniary benefit.

Murphy, Q.C., and *Rentoul, Q.C.* (with them *Barnard* and *H. E. Miller*), for the respondent. It must be taken that since the decision in the first trial the respondent did make these charges and did persist in them. But she did not originally concoct them without having grounds which might make a suspicious and angry woman believe them: see Lady Cardigan's letter. However, that will not help her, because at the time of the publication the verdict of the jury had been given.

But now on the general question. The appellant is the petitioner for all practical purposes; he alleges a matrimonial offence, and he must prove that, according to the ecclesiastical law as it existed before 1857, there was an act of cruelty which could be committed when the spouses were living apart, and depending entirely upon the fact that a libel had been circulated publicly and privately by one of the spouses concerning the other. The respondent contends that the definition of cruelty is that there must be danger to life, limb, or health, or a reasonable apprehension of it. You must consider the individual said to have been treated with cruelty. For what might be legal cruelty in the case of A. might not be so in the case of B. The dates are important: the marriage was on February 6, 1890, the respondent being then twenty-one. In May there was a separation for three months, with the consent of the family, to give time to adjust matters. The husband and wife came together for a short time at the end of May; and in June, 1890, there was a final separation. On November 28, 1890, came the first petition by the respondent. That petition contained no reference to the Mr. R. incident, nor was the Cardigan letter referred to, although received by her on November 21, 1890. Then came the unfortunate particulars in January, 1891, which referred to the charge. The hearing was on December 3, 1891, eleven months afterwards, and the result was that no legal cruelty was found. The dates prove that to say this charge was unbearable by the appellant was an exaggeration. Fortunately, Earl Russell writes to

H. L. (D.) 1897 RUSSELL v. RUSSELL.

the respondent in March, 1892, that he has received her letter, and that it is the first sign of sorrow for the wrong she has done him—"Of course, you are long since forgiven"; but that until he received from her some expression of sincere penitence and a plain avowal of her disbelief in so monstrous an accusation it would be a mockery for them to meet. She replies, persons have poisoned her mind. He rejoins, asking her to tell him that she does not *now* believe in the accusations, and that she was sorry she made them. Then she writes that his suggestion to meet at Doulton's is out of the question; and that the position resolved "itself into this: did he intend to make any provision for her in the future as regards money?" He replies it was a matter of deep regret to find no expression of repentance for her broken marriage vows; that in spite of all that had passed he would have been the first to have welcomed with joy and hope any sign of a better mind in her and of sorrow for the injuries done to him.

Then there is a correspondence between the solicitors, and an accidental meeting at Paddington, when the appellant formulates an apology which the respondent is to write. Then there is a correspondence with Mr. Rollo Russell, in which, more or less, the charge is renewed, and there is a very unpleasant matter contained in one of the letters—December 29, 1892—that if her views are not conceded to, she has been advised to publish the proceedings. That is a regrettable letter—one of the worst in the case. Then there is a letter of Mr. Lyulph Stanley, who wrote to her saying that "she had made and sworn to disgusting accusations." It cannot be denied that this was the state of matters when this petition for restitution of conjugal rights was filed. Therefore, from December 3, 1891, to May, 1894, Earl Russell never formulated this charge of cruelty, and no step was taken by him until his counter-claim in this action; further, his petition was not so much to obtain redress as to defeat her action. Now, is the above conduct legal cruelty by the wife towards her husband, having in view the law before 1857? There is no trace of any relief given to a husband against a wife, or vice versâ, for acts done when they were not living together. Secondly, there is no decision that words

spoken or written, even when the parties are living together, afford material for a finding of sævitia; Thirdly, the almost uninterrupted weight of authority of very eminent judges for the last 150 years is against the existence of any matrimonial offence for words spoken and letters written *alone*; and, Fourthly, cruelty towards one person might not be cruelty towards another person: *Mackenzie* v. *Mackenzie*. (1)

[LORD WATSON mentioned *Gordon* v. *Gordon*. (2)]

In *Bray* v. *Bray* (3) it was clear there were a great number of other charges of cruelty, and the question was whether a well-known practice could be followed, namely, of allowing additional articles to be added to the libel. A decision upon the admission of articles could not be of the same importance as a decision upon the rights of the parties. Sir John Nicholl could not have intended to decide that the allegation of incest was sufficient, because he decided in the opposite sense in *Durant* v. *Durant* (4); see also the same judge in *Barlee* v. *Barlee*. (5) In *Milner* v. *Milner* (6) the whole course of conduct the wife had been subjected to culminated in a specific act, and there was danger of it being repeated. Take the case of *Montgomery Moir of Leckie* v. *Lady Leckie* (7) in this House in 1751. There the wife filed her petition, alleging cruelty in her own house. There were suggestions of unchastity and so on by her husband. Her summons set forth various articles: that the defender, contrary to the duty of the relation betwixt them, had attacked the pursuer, his wife, most calumniously and injuriously in her honour and reputation, and had behaved to her in such a manner that she could not live or abide with him in safety; that he wrote a letter to Sir Walter Montgomery, her uncle, in which he loaded her with the grossest calumnies without any manner of foundation in truth, and endeavoured all that in him lay to wound her reputation in a manner hitherto not to be paralleled betwixt husband and wife; and therefore concluding for a separation à mensâ et

(1) [1895] A. C. 384.
(2) (1697) Mor. Dict. 5902.
(3) 1 Hagg. Ecc. 163–7.
(4) 1 Hagg. Ecc. 733.
(5) (1822) 1 Add. 305.
(6) 4 Sw. & Tr. 240.
(7) Elchies' Dec. H. & W. No. 35, and vol. ii. p. 193; 6 Pat. App. 687.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

thoro and for separate alimony. In her pleadings she alleged: that from the time of their marriage to that of their separation the defender had lived with the pursuer in a course of discontent and passion which broke out into several contumelies and abuses; and at last he had proceeded so far as to threaten to pistol her; secondly, that he had agreed to a separation from the pursuer, and with that view had taken from her the marriage ring and some other trinkets which he had given her before marriage; thirdly, that he had abused her character in a letter to her uncle, Sir Walter Montgomery; and, fourthly, that he had procured letters of inhibition against her upon false and calumnious allegations. These allegations accused her of lasciviousness. The Commissaries in August, 1748, ordered the pursuer to give in a condescendence, which was done and a proof was allowed. Then in 1749 the defender was allowed to prove all the facts and circumstances he relied on. On January 9, 1750, the Commissaries found facts, circumstances, and qualifications proven relevant to infer separation and aliment to the pursuer. The defender brought a bill of advocation on June 8, 1750; the Lord Ordinary, after advising with the Lords, pronounced an interlocutor refusing the bill of advocation, but he remitted the case to the Commissaries with this instruction: "To consider the proof, and to find that there is no sufficient evidence adduced to support the conclusions of separation and aliment and to proceed." On December 7 the Court, on a reclaiming note, refused the defender's bill of advocation simpliciter and remitted the cause to the Commissaries. This last interlocutor virtually altered the one immediately preceding. The opinions of the judges are summarized by Lord Elchies in his decisions: "When the case was last before us, I was against the separation, yet in further considering the case I altered my opinion. I thought that the lady, having on her husband's information been represented to the world as a monster of nature for lasciviousness and a reproach to her sex, and which scandal has by the husband and his counsel in all their writings and pleadings been maintained to be true, although they said it was impossible to prove them, I thought it impossible that thereafter they could live together as husband and

wife, that he could wish to take her again to his bosom, or that she could live with a man who in effect declares that she is unworthy of living, and who had for ever debarred her from the society of every modest woman who would believe him; that though his justification from the imputation of impotence, wherewith she is said to have reproached him to one or two of her confidents, had made it excusable to him to inform his nearest friend of her insatiable appetite, yet he must at the same time have resolved to separate from her, because they could not consistently with the honour of either of them thereafter live together, and whenever matters came to that pass the Court could not refuse a separation, and he was to aliment her so long as she was his wife, at the same time I saw no necessity for such vindication, nor evidence of the truth of what he reproached her with, and far less saw I necessity of propagating that scandal to so many or maintaining it in courts of justice. Kilkerran also changed his opinion, and upon the question it carried to alter the last interlocutor and to refuse the bill of advocation simpliciter." The appellant, the husband, thereupon brought his appeal to this House against the interlocutors of January 9 and December 7, and for the affirmance of the interlocutor of June 8, 1750. On April 24, 1751, this House (1), after hearing counsel for both sides for three days, ordered that the interlocutors appealed against should be reversed, and affirmed the interlocutor of June 8, 1750, holding that there was no cause for separation. That is a very strong case: can one conceive a modest woman who could be more horribly outraged than that lady was by those accusations of inordinate lust? Then we have no cruelty found in *Holmes* v. *Holmes* (2), where that outrage was threatened to be committed upon the wife in the presence of two men. There the husband was suing for restitution of conjugal rights, and his conduct was held not to be a bar. In *Otway* v. *Otway* (3), a wife's petition for separation à mensâ et thoro, it was alleged that the husband called her opprobrious names, and accused her of adultery and incest; but it was also shewn that her health had been

(1) Present, Lord Chancellor Hardwicke.

(2) 2 Lee, 116.

(3) (1812) 2 Phil. Ecc. 95.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

materially affected, and she got relief from Sir John Nicholl: see also *Westmeath* v. *Westmeath* (1) and *Dysart* v. *Dysart* (2), which latter case was relied upon by the appellant as shewing that Dr. Lushington was not accurate. *Evans* v. *Evans* (3) and *Paterson* v. *Paterson* (4) were examined by the Court of Appeal, and the views of the majority may be adopted as argument for the respondent. (5) Lord Stowell's language, "that what merely wounds the mental feelings was in few cases to be admitted where not accompanied with bodily injury either actual or menaced," did not imply an exceptional case, but was language dealing with the case before him. In *Paterson* v. *Paterson* (4) Lord Brougham took a different view from the Inner House of the facts. As he found them, he held that there were no materials to warrant a judicial separation. That being the case, his remarks on the multitudinous questions which he raised were obiter dicta.

[LORD HERSCHELL. It may be a decision of this House, and so far as it decides the facts we are bound by it; but I should respectfully decline to be bound by anything except the actual decision.

LORD WATSON. I am of the same opinion.]

It is submitted that there has been no check in the current of decisions since *Evans* v. *Evans*. (3) If in *Popkin* v. *Popkin* (6), where the husband attempted to debauch his own women servants in the house, no relief was given, the test as to whether or not cohabitation was right cannot stand. In *Oliver* v. *Oliver* (7) it was put that words of menace importing the actual danger of bodily harm will justify the interference of the Court, as the Court ought not to wait until the mischief is done. But it was said that the most innocent and deserving woman will sue in vain for the Court's interference for words of mere insult, however galling. *Gale* v. *Gale* (8) decided that a charge of having committed incest was not alone enough. It is

(1) 2 Hagg. Ecc. Supp. 1, at p. 57.
(2) 3 N. of C. 324; 5 N. of C. 194.
(3) 1 Hagg. Cons. 35.
(4) 3 H. L. C. 308; 7 Bell's App. 337.
(5) [1895] P. at pp. 322–6.
(6) 1 Hagg. Ecc. 765, 768.
(7) 1 Hagg. Cons. 361.
(8) 2 Rob. Ecc. 421.

common in these cases to produce evidence that the aggrieved spouse has suffered in health. But here there is no such evidence to hand. In *Kelly* v. *Kelly* (1) it was proved that there might be paralysis or madness if the persecution by the husband was continued.

[LORD HALSBURY L.C. The important advance there was that there was no blow and no actual injury to health. No doubt the Court was influenced by medical evidence; but if the moral torture were such as to be likely to produce that result, it would be difficult to say that is not an authority against the respondent. Are you disposed to concede that in this case, if it could be shewn that the husband's health might be seriously affected by the repetition of this charge, then there would be a ground for separation?]

If the parties had been living together and such a state of things could be proved, yes—it would be sufficient. But the protection of health is the object; and there is no case where this question of injury to health has been considered where the parties are living separate. That such a point has not been taken before is overwhelming.

[LORD WATSON. If the Court is satisfied that there is an actual risk in the particular circumstances of the particular case, is that sufficient for the Court to act on?]

Yes; the question of health is not here in debate. It was not pleaded that the appellant did anticipate injury: all he asked for was an apology. Truly, there was no case to leave to the jury; and, secondly, the question would be, if the jury had been properly directed, was the verdict right? The last words of Pollock B., in addressing the jury were: "If you think the facts bring the case within the principle that I have mentioned to you in laying down the law, then you would be entitled to find your verdict for the respondent [Earl Russell], but in doing so of course the fact that you are, in one sense, enlarging the law upon the subject, should make you very careful when you come to consider what your verdict shall be. Ultimately it must be a verdict founded upon your judgment, and upon yours alone. You will have had the advantage

(1) L. R. 2 P. & D. 59.

H. L. (D.) 1897 RUSSELL v. RUSSELL.

of discussing the case and considering it together—mind consulting with mind, and pointing out all the different circumstances which ought to bear upon that verdict, and having done that, you will then say in the first place, Do you consider the conduct of the petitioner, Lady Russell, was that of cruelty—cruelty such as disentitles her to the right which she asks here, of restitution of conjugal rights? Again, I would ask you, as I have said before, the second question—Do you consider in the course of her conduct since the trial that she was acting bonâ fide or not?"

It is unnecessary to consider whether the Act of 1884 altered the law as to the right to relief in a petition for restitution of conjugal rights. The respondent maintained in the Court of Appeal that it did not, though the point was not argued. It was suggested by the Court itself. The cases on this point are *Holmes* v. *Holmes* (1); *Burroughs* v. *Burroughs* (2); *Barlee* v. *Barlee* (3); *Dysart* v. *Dysart* (4); *Mackenzie* v. *Mackenzie* (5); *Waring* v. *Waring*. (6)

Robson, Q.C., in reply. The jury found as a fact that the respondent made this charge maliciously.

[LORD HERSCHELL. It is not disputed now that she persisted in the charge at a time when she did not believe it.]

The real test of cruelty is what would happen if the Court forced these parties to live together. It is not open to question that if they were forced to cohabit this charge, if persisted in, would break down the appellant's health as much as it did in the case of *Kelly* v. *Kelly*. (7) It was quite possible to put doctors into the box to prove that would be the inevitable effect of the parties living together and the repetition of this charge by the wife. [He also referred to *Saunders* v. *Saunders*. (8)]

The House took time for consideration.

LORD HALSBURY L.C. My Lords, before dealing with the appeal, I think it right to mention that I have received, as I

(1) 2 Lee, 116.
(2) 30 L. J. (P. & M.) 186.
(3) 1 Add. 301.
(4) 3 N. of C. 324; 5 N. of C. 194.
(5) [1895] A. C. 384.
(6) (1813) 2 Hagg. Cons. 153.
(7) L. R. 2 P. & D. 59.
(8) (1847) 1 Rob. Ecc. at p. 555.

suppose all your Lordships have received, a document professing to deal with the merits of this case, and intended to influence the decision at which your Lordships might arrive. My Lords, that the sending of these documents was a gross and scandalous contempt and a breach of privilege cannot be doubted, and, but for what I am about to refer to, it would have been my duty to move that the authors of this outrage should be summoned to the Bar of the House, and in the absence of some explanation or excuse to move that they should be committed to prison. My Lords, from what has happened in the criminal courts it is clear that the persons responsible have already been sent to prison for the publication of these papers as libels, and, unless your Lordships should think otherwise, I do not propose to take the course I have suggested; but it is only because justice has been satisfied by the punishment already inflicted: and it must be understood that it is only on that account that your Lordships do not proceed to punish one of the worst cases of contempt within my recollection.

In dealing with the substance of this appeal, I think it is necessary to consider the nature of the jurisdiction which your Lordships are here exercising. It is, since the Act of 1857, that of the Spiritual Court. The Courts to which an appeal lies have to place themselves in the position of the Ecclesiastical Courts, and, except so far as the law has been altered by statute (a topic which requires separate treatment), to proceed on principles and rules as nearly as may be those on which the Ecclesiastical Courts acted previous to the passing of the statute.

Now, in dealing with a question like the present, involving the relations of married people towards each other, the Spiritual Courts always proceeded to act as having full jurisdiction over domestic life. They investigated the whole conduct of the spouses, and they undoubtedly recognised no middle course between the order for renewed cohabitation between them and an order for the separation from bed and board. So far, I entirely concur with the Court of Appeal.

Sir George Lee in 1755 (in *Holmes* v. *Holmes* (1)) laid down

(1) 2 Lee, 116.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Halsbury L.C.

in express terms that nothing could be offered in lieu of the decree that the wife should live with the husband but such facts as would entitle her to a divorce in case she had brought a suit against him to be separated for cruelty. The case was appealed to the Delegates, consisting of three of Her Majesty's judges, with Foster J. at their head, and three learned civilians, and affirmed in the year 1757. That decision, so far as I know, in the interval between that date and the passing of the Act of 1857, has never been qualified or questioned; and I am therefore of opinion that was the recognised law of the Spiritual Court down to the passing of the Matrimonial Causes Act; and Sir Cresswell Cresswell (*Burroughs* v. *Burroughs* (1)) and Lord Penzance (*Scott* v. *Scott* (2)) both held that the same rule applied since the passing of the Act of 1857.

That some general principles actuated the judges who from time to time exercised the jurisdiction with which we are now dealing is true; but, nevertheless, it is necessary to remember that each case was itself always one which raised a question of fact and degree. In dealing with such questions, it is not always possible to disentangle what is decided as matter of law and what is decided as matter of fact, and it certainly cannot be laid down that whenever a divorce was refused that that established the proposition that the cruelty charged, or even that of which some evidence was given, was not cruelty in point of law. The judge had in his own mind to determine what and how much was established to his satisfaction, so that he could act upon it, and further, whether the facts deposed to were caused by provocation, or were mere exceptional and rare instances of bad temper, or the like; and in reviewing the numerous cases decided it is impossible not to be struck with the extreme caution with which each case is expressly decided upon the facts held by the judge to be proved, and the relation of such facts to the whole married life of the parties to the suit.

In the view the Ecclesiastical Courts took of the sanctity and perpetual obligation of the rights between the spouses, it is intelligible enough that they should have sternly enforced the

(1) 2 Sw. & Tr. 303. (2) (1864) 34 L. J. (P. & M.) 23.

duty of continued cohabitation, except in such cases as, to use the phrase continually recurring, "when the facts shew an absolute impossibility that the duties of the married life can be discharged." The phrase "impossibility" may, of course, be criticised, and it may be suggested that in no conceivable set of circumstances could such a phrase be justified; but I think the argument may be retorted, since the circumstances which in the judgment of every one would justify such a decree are not always—and, indeed, not often—those which will make a wife sue for separation. It is the experience of almost every one that they have known cases where the wife has clung to the husband and prevented his being punished when he has habitually been guilty of the most cruel violence and ill-treatment; but the question is whether, against the will of the suffering spouse, matrimonial duties are possible in any intelligible sense when the conduct of either towards the other must excite feelings of horror and even loathing. Applying such a phrase as I have quoted, and which, as I say, recurs again and again, in the opinion of very learned judges, to the ordinary course of domestic life, I think it is a very apt phrase to express in a short form the principle upon which, as it appears to me, all the cases have been decided.

Each case, of course, has disclosed its own circumstances, and in the mixed judgment where facts have to be found and principles applied it is not surprising that no legal definition of cruelty should have been laid down. The most common case has, of course, been physical suffering inflicted by a man upon his wife; but if the view contended for on behalf of the respondent were correct, it would be almost impossible to suggest that a man could ever sue for separation from his wife for cruelty. And even in what I have described as the commonest cases, what infinite degrees there must be in the application of any rule except the rule I have insisted upon as the one rule laid down expressly or impliedly in all cases.

Questions of provocation of cruelty, of frequency in the conduct complained of, must come in review, and be the subject of averment, and treated as questions of evidence; they were always subject to the calm judgment of a tribunal which knew

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Halsbury L.C.

how to discount the exaggerations of two angry people, and weigh the facts, and consider whether the facts when so discounted ought to prevent them living together.

It appears to me, therefore, in reviewing what is said in the various cases that have been brought to our notice, we ought carefully to note what facts the judges have assumed to be proved.

My Lords, I think no better illustration of this can be found than in the case of *Paterson* v. *Paterson* (1), decided in this House. Lord Brougham himself carefully points out what he regards as having been proved. The noble and learned lord in dealing with the facts begins by saying that "not merely violence, but things far short of violence would justify the Court in pronouncing a separation"; and, differing with Lord Jeffrey as to what was proved in the case, he gave as an illustration of what would justify the Court in pronouncing a separation, "the holding her up to scorn before her own servants; ordering her servants not only to disobey her, but to join in the chorus of hissing against their mistress, his wife, the mother of his children, as the head of his family." Lord Brougham then goes on to add these significant words: "When Lord Jeffrey puts that as a case, I have only to answer it by saying that it is a very good case to support a proposition, which I do not deny, and which nobody seriously denies, videlicet, that it is not necessary that there should be personal violence to constitute a ground for divorce."

He then goes on to shew what he held to be proved in the particular case, which consisted in "withdrawing from her society; coldness towards her; leaving her apartment; telling her father that he will on no account ever renew his cohabitation with her; stating that he is wretched in consequence of his marriage—all things very painful to the feelings of the woman, all things very unhappy for the man, but anything rather than those things which Lord Jeffrey supposes in the case put."

Now, it may be that Lord Brougham undervalued some of the evidence in that case—that he minimised the effect of some

(1) 3 H. L. C. 308, at pp. 328, 333; 7 Bell's App. 337.

of the proof offered. It may be even that some of your Lordships would not agree with some of the conclusions which the noble lord derived from the evidence. But it appears to me that that is nothing to the purpose. The principle of law that he lays down must be applied to the state of facts which he rightly or wrongly assumed to be proved, and nothing can be more emphatic than his negation of the proposition that personal violence, either threatened or inflicted, is an essential condition of the relief claimed by the petitioning spouse. It is to my mind very obvious why no judge has ever yet attempted to propound an exhaustive definition of cruelty.

If, as I have said, the Spiritual Court regarded married life as a whole, it would be absolutely impossible to lay down in the iron framework of a definition that which would constitute such cruelty as would necessarily justify separation; the questions of fact and degree would qualify almost any proposition that could be formulated; for example, a slight blow under great provocation, and on a single occasion during a long life, could hardly be suggested as a ground for separation, though upon that hypothesis personal violence existed. On the other hand, it is possible to conceive a course of treatment which would make the continuance of the marriage bond, involving the obligation of the continued consortium, more terrible than the severest bodily suffering.

Whether the Court of Appeal were right or wrong in the middle course which their judgment suggests between a decree for restitution and a decree for judicial separation is not, perhaps, very material here, in the actual form of the judgment which your Lordships will be asked to pronounce, since the lapse of the respondent's appeal has rendered it unnecessary. But it cannot be doubted that the Act of Parliament under which the Court of Appeal considered themselves justified in arriving at the middle course made no difference in the law of what constituted legal cruelty, and I think we must look at that question uninfluenced by difference of consequences that would follow if the law has been altered in respect of the remedy which a complaining spouse may obtain.

If one were to review each case in turn, and extract from the

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Halsbury L.C.

judgment of the learned judges who have from time to time exercised the jurisdiction in question, I think it would be impossible to reconcile their judgments, even the judgments of the same judge, unless by giving a non-natural sense to the word used, e.g., attributing to an ecclesiastical judge the popular use of the word "cruelty" in a judgment dealing with the question of cruelty in a case of divorce à mensâ et thoro. But one must read them by the light of a very familiar canon, that one must read a judgment, however general in terms, as having reference to the particular facts with which the judgment is dealing. As no judge has ever affected to define what cruelty is exhaustively, so no judge has, in my view, ever affected to prescribe what individual elements would go to make up cruelty; and in this case, if your Lordships' judgment should be against the appellant, it must go to the extent of saying that there was no evidence to go to the jury which justified them in finding that the course of conduct pursued by the respondent amounted to cruelty. If there was evidence for the jury, then Pollock B.'s direction was right; and if his direction were wrong, it would not justify a judgment for the respondent, unless, there being no evidence for the jury, Pollock B. was wrong in leaving it to them.

If the narrow proposition that the cause of separation must be such as to cause injury to life, or limb, or health, it is manifest that in many of the cases reported it would be ridiculous to suggest peril of life or limb, and the speculation as to health must become elastic, according to the health and strength or feebleness of the particular person towards whom the cruelty is exercised. I am not certain that, apart from all other questions which arise in this case, it would not be sufficient to say here that persistent accusations of the character which existed in this case, and made by a wife, might not be held to raise a reasonable apprehension of danger to health. There are few people who are familiar with the administration of the criminal law who will not acknowledge that madness and suicide are not uncommon consequences of persistent accusations of this character.

It remains to consider whether, in this case, there was

evidence for the jury of such cruelty as would have justified the Court in pronouncing a decree of separation.

My Lords, it is a painful and a disgusting task to go through the evidence, but I think I can summarise it sufficiently for what I have to say without entering into minute details. It is perhaps sufficient to describe the respondent's conduct in this way. She persistently made accusations against him which, if believed, would drive him from human society; she made them where they would be most likely to be spread abroad, and as both in criminal and in civil jurisprudence people are taken to intend the reasonable consequences of their acts, she must have contemplated that all who encountered her husband would regard him with loathing and horror. She did this, as the jury have found, without any belief in her abominable and disgusting accusations, and with a base motive of extracting better pecuniary terms from the husband whom she thus vilely slandered.

My Lords, I know it has been said that the appellant may safely disregard accusations which have been challenged to proof, and where the proof has signally failed. I regret to say I cannot acquiesce in that suggestion. It is true that in this House and in every court where the question has been litigated Lord Russell has vindicated himself; but how many people are there who will have had the opportunity of judging from the evidence and giving it its true weight? How many people are there who take the trouble to investigate any case in which they have no personal concern, much less a case of this repulsive character? For my own part, I believe an accusation of this kind is an incurable injury to the person against whom it is directed.

And now, my Lords, if the jury were right upon the facts that they have found, can any one conceive a Court enforcing cohabitation with such a woman? I think there can be but one answer to that question; and yet, as I have pointed out already, but for the Act of Parliament there can be no doubt on the authorities, the Court, if deciding to refuse separation, would have been compelled, at all events, before 47 & 48 Vict. c. 68, both to decree cohabitation, and enforce it by

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Halsbury L.C.

imprisonment of the husband who should refuse to comply with the order.

As I have already said, it is immaterial for the purposes of your Lordships' Order whether the construction placed upon it by the Court of Appeal be right or wrong; but I must express my dissent from that construction. As the Court itself declares, the Act in terms relates only to the consequences of not obeying a decree of restitution when made. It does not, I think, in any way refer to the grounds on which such a decree can be refused. It certainly does not in terms give the Court any power to refuse a decree which it did not possess before the passing of the Act. It attaches certain consequences to the refusal to obey a decree, and gives certain rights to the injured spouse in lieu of the old authority which a Court possessed to enforce obedience by attachment and consequent imprisonment.

I confess I am unable to follow the Court of Appeal in saying that since 1884, by necessary implication, the Court must have power to refuse a decree for restitution where the result will be to compel the Court to treat one spouse as deserting the other without reasonable cause, contrary to the real truth of the case. My Lords, it seems to me that this is reading into the Act of Parliament provisions which are not there, and giving a construction to provisions that are there which it is very difficult to imagine the Legislature to have contemplated, the purport and meaning of the statute apparently being simply to provide a new remedy where a decree for restitution had been granted, and where the person disobeyed the order. I cannot conceive that any alteration of the law was contemplated other than that which was expressly enacted.

My Lords, for these reasons I think that the order appealed from should be reversed, and the judgment of Pollock B. restored.

LORD WATSON. My Lords, being in complete agreement with those of your Lordships who are of opinion that the decision of the majority of the Court of Appeal is according to law, I am unable to concur in the views which have been expressed by the Lord Chancellor. The considerations which

have led me to that result are so clearly and fully expressed in the judgment which has been prepared by my noble and learned friend Lord Herschell that I have thought it quite unnecessary to occupy the time of the House by repeating them in my own language.

I move that the order appealed from be affirmed with costs.

LORD HOBHOUSE. [His Lordship having stated the facts as given above continued:—]

Such is the outline of the material facts which have caused this litigation and of the litigation itself. The question is whether the Countess has been guilty of such cruelty as, according to the principles and rules on which the Ecclesiastical Courts acted down to the Act of 1857, and which were continued in operation by that Act, requires the Court to grant a decree of separation against her. Whether or no her petition for restitution has been rightly dealt with is a point which has not been argued on the present appeal, and I say no more about it except this: that I hardly understand how the indirect effect of legislation on the subject of desertion, without cause, can stop short at the exact point of refusing a wife's petition for restitution, and, having gone so far, can fail to draw after it the established consequences of such a refusal. Assuming the present decision to be right, it is but an indirect and quite unforeseen effect of new law directed to another object. It may relieve the minds of judges from the terrible responsibility which would have pressed on the ecclesiastical judges in ordering the husband to take back his wife. But the legal question still remains the same as before. Would the Ecclesiastical Courts in 1857 have been bound to make such an order? For as shewn above, the law has been constant that, unless the husband can demand separation, the wife can demand restitution.

Starting from this point, I cannot persuade myself that any judge would have felt himself so bound by precedent as to compel an innocent husband to take back a wife guilty of falsehood and persecution such as has characterised the conduct of the Countess in this case. It appears to me that, though the

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

doctrine of danger (1) has sometimes been laid down by judges in terms more absolute than can be justified when the view is extended beyond the particular case under decision, on the whole they have been cautious not to attempt exhaustive definitions excluding other forms of cruelty which may occur in the infinite variety of human affairs. That violence and bodily danger are far the most common forms of cruelty accounts for the frequent repetition of the formulæ relating to such things. But we find not only judicial recognition that there may be other forms of cruelty, but judicial dicta and decisions taking a wider range, and quite irreconcilable with the rigid line by which it is now sought to confine the jurisdiction of the Court. The argument for the Countess is rested by her counsel on a legal conception of cruelty said to be fixed by decisions of Ecclesiastical Courts. They must then take the ecclesiastical doctrines as a whole, and submit to be tried by the question whether the Ecclesiastical Courts would have granted a decree of restitution to the Countess; and I go on to examine the authorities bearing on that question.

Everybody begins the discussion of this subject by reference to Lord Stowell's judgment in *Evans* v. *Evans*. (2) The doctrine of danger was laid down by him with the caution to be expected from so judicial a mind. The case called for no other doctrine. Violence and danger were alleged by the wife. There were many other charges, some of them very trivial and all too trivial to found relief upon. Lord Stowell refuses to define cruelty. He lays down a wider principle than that of danger, namely, "an absolute impossibility that the duties of married life can be discharged"; and he points out that in a state of personal danger no duties can be discharged; i.e., such a state falls within the wider category. "What falls short of this is" to be—shut out? No; but "to be admitted with great caution." He intimates that there are cases, though few, in which what merely wounds the mental feelings is to be admitted as cruelty. Such is the cautious way in which the great judge handles this delicate topic. He is very far indeed

(1) See ante, pp. 398-9. (2) 1 Hagg. Cons. at p. 37.

from laying down the rigid line which is now insisted on. But Lord Stowell could not find any case in which divorce had been granted except on the doctrine of danger. "The Court," he says, "has never been driven off this ground." That is interpreted now as if he had laid down that it was not lawful for the Court to take any other ground. What, then, were the cases which he had in his mind when he intimated that danger was not an indispensable condition for divorce? For an answer to this question we are not left without light from Lord Stowell himself. In *Popkin* v. *Popkin* (1), during a discussion on the admission of articles, he said that a husband's "attempt to debauch his own women servants was a strong *act of cruelty*, perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to his wife's feelings." In *D'Aguilar* v. *D'Aguilar* (2) the wife alleged that the husband spat upon her. In admitting the article, Lord Stowell said, "Nothing can be more *gross cruelty*"; and he refers to a case in which a prohibition had been moved for, and was refused, "the only act of cruelty pleaded being spitting in the face." The same disgusting subject is referred to by Dr. Lushington in *Saunders* v. *Saunders* (3) thus: "Lord Stowell declares it to be *legal cruelty*. . . . . In truth, however, does such a question require any authority at all? So gross a personal outrage would be insufferable even in the lowest grade of life." And he goes on to say that such an outrage is worse than threats of personal ill-usage. We have, then, two instances of ill-treatment affirmed by Lord Stowell to be legal cruelty without any reference to the presence of danger. I am speaking of the quality of cruelty, or legal cruelty, which, as it is now asserted, cannot exist without danger. The amount necessary to support a decree for divorce is another question, to which I will address myself presently.

In the year 1825 was decided the case of *Durant* v. *Durant*. (4) The husband had accused his wife of an intrigue with the children's tutor. Sir J. Nicholl expressed himself thus: "Is

(1) 1 Hagg. Ecc. 768.
(2) 1 Hagg. Ecc. 773.
(3) 1 Rob. Ecc. 549.
(4) 1 Hagg. Ecc. 733.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

there any woman who would not have considered an act of personal violence inflicted in passion, or even deliberately and maliciously, trivial and pardonable in comparison with this accusation; a charge made, not in the haste and error of the moment, but kept up and persevered in to the present time. If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision." This is a clear opinion that such a charge has the quality of legal cruelty, though the circumstances of that case did not compel the judge to decide whether it was enough of itself to warrant a divorce.

In 1828 the case of *Bray* v. *Bray* (1) came before the same learned judge. The wife applied for the admission of an article supplying proof that her husband had falsely charged her with incest. The article was admitted, Sir J. Nicholl saying: "It is not, I think, possible to conceive *cruelty* of a more grievous character (except perhaps great personal violence) than the accusation by this husband against his wife." It does not appear what was the result of the suit; but again the quality of legal cruelty was attributed to a false and foul accusation, without any reference to the doctrine of danger.

In 1847 Dr. Lushington decided the case of *Saunders* v. *Saunders* (2) above referred to. This eminent judge is one who has stated the doctrine of danger most emphatically, as in the case of *Neeld* v. *Neeld*. (3) Indeed, it was said at the Bar that he was the first to state the doctrine without qualification. Perhaps he meant nothing more than that if violence was the ground assigned for divorce, it must be violence enough to raise the case of danger. If he meant more, it only shews in a striking way how impossible it is for those who lay down a rigid definition of cruelty to adhere to it when brought face to face with actions which everybody feels to be cruel, but which the definition will not fit. For he emphasises and enlarges on Lord Stowell's treatment of spitting as in the

(1) 1 Hagg. Ecc. 163. (2) 1 Rob. Ecc. 549; 5 N. of C. 408.
(3) 4 Hagg. Ecc. at p. 265.

category of legal cruelty, and as an outrage worse than threats of personal ill-usage. And yet no danger was there alleged in connection with the act; and the idea of danger was only arrived at by ulterior speculations of what might happen from a person who had done such a thing.

In the year 1850 this House dealt with the Scottish case of *Paterson* v. *Paterson*. (1) The suit was by the wife for separation. The Lord Ordinary refused it. In his interlocutor he rested the judgment on this ground: "In respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer unaccompanied with personal violence or any menace thereof," and that it is settled by authority that such a libel is not relevant. The Court of Session took a graver view of the allegations, and decided in favour of the wife. This House, in which Lord Brougham was the only law lord who sat, thought that the Court of Session had misapprehended the facts of the case and reversed their decision. But it refused to restore the interlocutor of the Lord Ordinary as it stood because it contained an erroneous recital of the law, and it ordered that recital to be struck out.

That was the judicial act of this House: a decision that, at least according to the law of Scotland, it is not necessary for a wife to allege personal violence or any menace thereof in order to obtain divorce. Lord Brougham's observations during the argument and in moving judgment shew exactly what was in his mind. He states by way of hypothesis a case strongly resembling the present one—namely, that of a man continually falsely and publicly charging his wife with criminal conduct, and he says there is little doubt that the judicial dicta and opinions to which he had referred "would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured, and rendering life almost unbearable, the courts of the country would extend the remedy of a divorce à mensâ et thoro." His opinion seems to me to be quite in accordance with the doctrine of *Evans* v. *Evans* (2), and to express what from his other judicial utterances we may infer to have been the kind of case in Lord

(1) 3 H. L. C. at pp. 318, 328; 7 Bell's App. 337. (2) 1 Hagg. Cons. 35.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

Stowell's mind when he spoke of cases not covered by the rule of danger.

In *Gale* v. *Gale* (1), decided in 1852, the wife alleged that three days after her marriage her husband accused her of incest. Sir J. Dodson admitted the article, saying that the charge is not per se sufficient to constitute legal cruelty, but that it might be coupled with other averments. I take Sir J. Dodson to have meant by "legal cruelty" cruelty sufficient to warrant a divorce. He could hardly mean that there was no quality of cruelty in it such as the Ecclesiastical Courts would recognise. That would not only be contrary to *Durant* v. *Durant* and *Bray* v. *Bray*, but, as I venture to think, contrary to common feeling and common sense, which must enter largely into questions of this nature. But it might be that such an accusation, though false, was made under circumstances palliative of the offence, and that if made in a fit of angry suspicion, if not persisted in or not blazoned forth to the world or used as an engine of terror against the wife, it would not per se be considered as sufficient cruelty for a divorce. The report is silent as to all such circumstances: it mentions only the fact of a single wrongful accusation. That is no authority against the separation sought in the present case.

In the year 1858 occurred the first case in which a jury was employed to decide this question: *Tomkins* v. *Tomkins*. (2) It was a suit by a wife, alleging personal violence and blows as constituting cruelty. Sir C. Cresswell told the jury that he must direct them what acts constitute legal cruelty, and they must find whether the acts done were cruelty or not. He points out the difference between the position of a jury, who must decide quickly, and that of a judge, who can give time and thought to his decision, and shews the necessity for great caution and circumspection. On the merits of the case he refers at length to *Evans* v. *Evans* (3), and puts it to the jury that there must be bodily hurt, not trifling or temporary pain, or reasonable apprehension of bodily hurt.

Thus Sir C. Cresswell lays down the law after the Divorce

(1) 2 Rob. Ecc. 421. (2) 1 Sw. & Tr. 168.
(3) 1 Hagg. Cons. 35.

Act on the same lines as existed before. The doctrine of danger which he laid down was applicable to the case before him and sufficient for it. But his judgment in *Milner* v. *Milner* (1), which occurred in 1861, shews either that he never looked on that doctrine as sufficient to cover all possible events, or, if he meant to pronounce a rigid rule, that he, like Dr. Lushington, found himself unable to maintain it in the face of gross cruelty unaccompanied by danger. There the wife sued for divorce on the ground of adultery (which was proved) and cruelty. There was no substantial case of cruelty except for a single incident, on which, according to the report, the whole decision turned. The wife had followed her husband in the street, when he behaved to her in a way that led a bystander to think her a prostitute, and so to insult her. On this Sir C. Cresswell said: "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated." Then, after referring to the evidence, he adds: "It is a case of the grossest and most abominable *cruelty*." Not a word is said about danger to the wife. The whole decision is rested on the outrageous insult by the husband.

In the case of *Pickard* v. *Pickard* (2), decided in 1864 by Lord Penzance, the Court admitted, in another direction, a wider range of considerations as justifying a decree for separation. The suit was by the husband, complaining of the violence and cruelty of his wife. It had been laid down by Dr. Lushington in *Furlonger* v. *Furlonger* (3) that, subject to distinctions necessarily founded on difference between the sexes, the same rule of danger must prevail, whichever was the complaining party, and that necessary protection was the foundation of all separation. Lord Penzance points out that the man can seldom be afraid of danger from his wife's violence. He says: "I do not believe that his wife ever intended, or is likely, to do him serious harm by personal violence. Violence by the husband, and similar conduct by the wife, hardly deserve to be considered

(1) 4 Sw. & Tr. 240. (2) 33 L. J. (P. & M.) 158.
(3) 5 N. of C. 425.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

in the same identical light . . . . But if the physical effects of violence by the wife are less, the moral results are immeasurably greater . . . . Worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self-defence. And if, holding its hand, this Court refuses to relieve from the perils of provocation, what security is there for the safety of the wife herself?" He decreed for separation on this ground. And in the case of *Forth* v. *Forth* (1), decided in 1867, the same learned judge applied the same principles.

Now, it is certain that the doctrine of danger to life and limb means danger to the party complaining, and danger as proved by the acts of the party complained of. And yet in these cases an eminent judge has acted quite independently of this doctrine, and has decreed separation when there was no danger to the husband who asked for it, and no ground laid for suspecting any to the wife who resisted it. This he did, first, because of the greater moral effect of violence by the wife, and, secondly, on a broad view of matrimonial relations, and of the possible consequences of continued cohabitation. Whether these considerations do not open a wider range to the discretion of the Court than was before contemplated, may be doubted; but they certainly shew that, in the opinion of Lord Penzance, there existed no such rigid rule as is now contended for, and that proof of danger is not a necessary condition of judicial separation. It was enough for him if the conjugal relations had been so shaken that further quarrels and remote consequential danger to either party might be inferred if cohabitation were resumed. If, then, the Court is to speculate on the remote possibilities of exasperating conduct and retaliation by the injured party, when the case, as proved, contains no evidence of such things, such speculations are at least as allowable in the present case as in those before Lord Penzance. Indeed, they may find room in every case of bitter quarrel, and thus the supposed doctrine of danger would be reduced to a nullity.

With regard to the above-cited judicial opinions, it has been suggested that opinions expressed on the discussion of articles, to the effect that acts not importing danger may be admitted to

(1) 36 L. J. (P. & M.) 122.

proof, do not amount to decisions that such acts are legally cruel, because acts not legally cruel may be brought in to aggravate the effect of acts which import danger, and, therefore, are legally cruel. And, likewise, when acts not importing danger have been characterised as cruelty, and have been relied on to support decrees for divorce in cases where acts of personal violence have also been committed. Now, it may be that in a question of conjugal conduct many acts not cruel, legally or at all, can be used to make it more probable that disputed allegations of cruel conduct are true. But in the cases cited the judges speak of the acts in question, not as proving that some other cruel act was committed, but as cruel in themselves; and I cannot find any trace of evidence that when speaking of cruelty they were not speaking of legal cruelty. If an ecclesiastical judge, discussing a purely legal question on the admission of articles or otherwise, says of a man's conduct that it is cruel, it must be assumed that he means cruel in the sense of ecclesiastical law, unless he explains that he means something else. When Sir J. Nicholl says of a false accusation of adultery that acts of personal violence are trivial compared with it, must he not mean that the two things are alike in their cruel nature, but that the false accusation is the most aggravated cruelty? When Dr. Lushington says of spitting that it is worse than threats of personal ill-usage, must he not be taken to put the two compared offences on a par in quality, and then to say which is the most heinous? In point of fact, the evidence of violence in *Saunders* v. *Saunders* (1) was not very cogent; and it is pretty plain that but for the act of spitting Dr. Lushington would not have decreed a divorce. Of the most important of the charges, he only says that the husband's conduct was very offensive, and that there was some, not aggravated, violence. But when he comes to the spitting, he uses the strong language cited above, and he makes it the main ground of his judgment. Certainly he adds that, "if taken singly," he need not say what the effect would be, and he couples it with the other misconduct. But suppose the husband were in the habit of spitting in his wife's face, and that in public, is it conceivable that either

(1) 1 Rob. Ecc. 549.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

Lord Stowell or Dr. Lushington would have refused a divorce on that ground alone? Looking at their language, I cannot conceive it. Nor can I conceive that they would not have put into the same category ruinous accusations by a wife, publicly made and repeated for a long time, though known to her to be false. Certainly, if judges have characterised acts as cruel, not meaning that they were cruel for legal purposes, they have used misleading language, such as we ought not to impute to them.

The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of judge or jury a case where acts, cruel in their nature, are so grave as to destroy the foundations of conjugal life. I do not think that any rule can be laid down less wide than that of Lord Stowell, "that the causes must be grave and weighty, and such as to shew an absolute impossibility" (meaning, of course, a moral impossibility) "that the duties of married life can be discharged." The fact that violence and personal danger are far the most common ground alleged for separation has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of the broader category indicated by Lord Stowell.

It is said that we cannot define "impossibility" of discharging duties. Certainly not; any definition would be either so wide as to be nugatory, or too narrow to fit the ever-varying events of human life. Neither can we define other terms applicable to human conduct, such as "honesty," for instance, or "good faith," or "malice"; or, to come nearer to the present case, "danger," "reasonable apprehension," "cruelty" itself. Such rudimentary terms elude a priori definition; they can be illustrated, but not defined; they must be applied to the circumstances of each case by the judge of fact, which in this case is a jury directed by a judge, and controlled, if erring in principle, by the Court above. I do not know any better or other way of deciding controversies on such points; and I fail to share the apprehensions of danger and of litigation which have been urged on us as likely to occur unless the conduct of the Countess Russell is excluded from the category of legal

cruelty. I think that the cases other than those of danger will still be few, and will still be admitted with great caution. Such a case as the present is, as far as legal records go, unexampled, and we may hope that it will not soon be imitated.

That the conduct of the Countess was cruel in its nature, as men deem cruelty, I cannot doubt, nor that it was of singular enormity. Cases were put during the argument where there might be extreme cruelty without personal danger to the victim. One was that the wife of a tradesman might go about to ruin her husband by falsely telling his customers that he adulterated his goods. Another was that the wife of a soldier might destroy his professional position by falsely stating that he was skulking at home when he ought to have been in the field. Would any Court, it was asked, venture to compel the husband to receive into conjugal intercourse a disloyal wife who had abused her position and her presumed knowledge of his conduct to inflict the greatest of injuries on him? Such supposed cases are, to say the least, no worse than the present one. They are only illustrations of the impossibility of limiting cruelty by the doctrine of personal danger, and of the necessity of resort to the wider question whether it is conceivable that the duties of the married state can henceforth be discharged. There are injuries worse than any personal danger. There are false accusations of crime and dishonour, such as have driven men to despair and suicide. Earl Russell appears to be a man of robust fibre, who can bear up against slander. But that cannot alter the nature of his wife's acts, nor can the cruelty or malignity of them depend upon the nerves of her husband. It still remains true that after her injurious charge against him had been disposed of and openly withdrawn by her counsel, she renewed it; gave vent to it in a newspaper; invited people to believe that she possessed written proofs of it, and had received written and oral incriminations of her husband from his nearest relatives; asserted that she had kept back her proofs at their entreaty, and out of compassion for them; and threatened further publication of these things from time to time during many months. All this is persistent falsehood and cruelty, with the object of inflicting pain and terror; and it is not made

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Hobhouse.

any better if its ultimate object was to frighten the Earl into making a pecuniary settlement satisfactory to the Countess.

It must always be borne in mind that the defence of the Countess rests wholly on the assertion that her conduct does not fall within a definition laid down by the Ecclesiastical Courts. It is that position which makes it necessary to examine minutely what Ecclesiastical Courts have said and done in the few cases which have presented features of cruelty apart from personal violence. Putting aside *Gale* v. *Gale* (1) as quite uncertain in sound, I cannot find that any one of the acts characterised as legal cruelty in the cases above cited has been alleged by any judge not to bear that character. All that was said and done by Lord Stowell in *Evans* v. *Evans* (2), *D'Aguilar* v. *D'Aguilar* (3), and *Popkin* v. *Popkin* (4); by Sir John Nicholl in *Durant* v. *Durant* (5) and *Bray* v. *Bray* (6); by Dr. Lushington in *Saunders* v. *Saunders* (7); by Lord Brougham in *Paterson* v. *Paterson* (8); by Sir C. Cresswell in *Milner* v. *Milner* (9); and by Lord Penzance in *Pickard* v. *Pickard* (10), stands uncontradicted. In it I find ample authority for saying that, by the law of the Ecclesiastical Courts, cruelty has never been confined to cases of personal danger, but has been judged by the wider and more reasonable criterion expressed by Lord Stowell, namely, whether or no conjugal duties have become impossible between the litigant husband and wife. In my judgment they have become impossible in this case, so far as impossibility can be predicated of human feeling and action. I think that the conduct of the Countess transcends in cruelty and enormity the actual circumstances on which the various judicial opinions above cited have been given, and equals the hypothetical case put by Lord Brougham. Therefore I conclude that Pollock B. put the case rightly to the jury, and that his judgment founded on their verdict should be restored.

(1) 2 Rob. Ecc. 421.
(2) 1 Hagg. Cons. 35.
(3) 1 Hagg. Ecc. 773.
(4) 1 Hagg. Ecc. at p. 768.
(5) 1 Hagg. Ecc. 733.
(6) 1 Hagg. Ecc. 163.
(7) 1 Rob. Ecc. 549.
(8) 3 H. L. C. 308; 7 Bell's App. 337.
(9) 4 Sw. & Tr. 240.
(10) 33 L. J. (P. & M.) 158.

LORD ASHBOURNE. My Lords, the decision in this case turns solely upon the question of whether the appellant has made out that Lady Russell was guilty of legal cruelty to him.

The Court of Appeal (Lindley and Lopes L.JJ.; dissenting, Rigby L.J.) has laid down a definition of legal cruelty in the following terms: "There must be danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it, to constitute legal cruelty."

As far as I can ascertain, no tribunal has before, in the history of our law, taken the grave responsibility of express definition.

As might be expected, each of the cases cited has shewn special facts of its own, and a wide diversity of circumstances. As might also be expected, danger, and the apprehension of it, are found in the vast majority of cases; but judges have on the whole been careful not to lay down any exhaustive definition, although many of them have indicated that great caution would be requisite in seeking to go outside such a clear cause as danger. Thus, Lord Stowell, in the case of *Evans* v. *Evans* (1), pointed out that what fell short of danger "should be admitted with great caution." And again he said: "what merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied by bodily injury, either actual or menaced." I am not satisfied that he meant to lay down a definition (an idea he had disavowed) when he spoke of conduct shewing "an absolute impossibility that the duties of married life can be discharged." I, on the whole, collect from Lord Stowell's judgment that he regarded danger, or the apprehension of danger, as what might be anticipated, as a rule, to be found in cases where cruelty was charged, and that if any charges outside those clear limits were alleged, they should be regarded as exceptional and "admitted with great caution."

The words of this great judge in subsequent cases would support the view that he did not regard himself as having laid down any precise or exhaustive definition of cruelty in *Evans* v. *Evans*. (1) Thus, in *Popkin* v. *Popkin* (2) he said that a husband's attempt to "debauch his own women-servants was a

(1) 1 Hagg. Cons. 35.

(2) 1 Hagg. Ecc. at p. 768.

H. L. (D.) 1897 RUSSELL v. RUSSELL. [Lord Ashbourne.

strong act of cruelty, perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings." The word "perhaps" shews how carefully he shrank from any exhaustive definition, and also indicated the "great caution" which he felt should be applied in reference to charges of cruelty other than danger, or the apprehension of it.

Again, in *D'Aguilar* v. *D'Aguilar* (1), he admitted an article with the allegation that the husband spat on his wife, saying that "nothing can be more gross cruelty." Of course, it has to be borne in mind that an article was admissible if it disclosed relevant facts, and that it was not essential that each article need contain a statement sufficient to justify a divorce. A great ecclesiastical judge, however, would not use the words "gross cruelty" without having present to his mind the grave judicial significance that might be attached to them. This would seem the more probable from his referring, without disapproval, to a case in Hetley, where "the only act of cruelty" pleaded was spitting in the face. I am not concerned to discuss this case in Hetley or the accuracy of the reference to it. The important point is to note Lord Stowell's view of a case where spitting in the face was the "only act of cruelty." In the later case of *Saunders* v. *Saunders* (2) Dr. Lushington refers to the case of *D'Aguilar* v. *D'Aguilar* (1), and the charge of spitting in the face: "Lord Stowell declares it to be legal cruelty. . . . Does such a question require any authority at all?"

The judgments of Sir John Nicholl in the different cases cited are not entirely consistent, and would go to shew that he had not present to his mind that there was, or could be any clear, distinct, or exhaustive definition of cruelty. In the case of *Westmeath* v. *Westmeath* (3) he said: "There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury." But there he had been commenting on cases where those elements were present. In the case of *Durant* v. *Durant* (4), so much referred to, where a false and

(1) 1 Hagg. Ecc. 773.
(2) 1 Rob. Ecc. 549, at p. 561.
(3) 2 Hagg. Ecc. Supp. at p. 72.
(4) 1 Hagg. Ecc. 733, at p. 769.

unfounded charge of misconduct had been brought against a blameless wife, Sir John Nicholl said: "Here is not cruelty which would support a sentence propter sævitiam, but here is an act which might be pleaded as such in conjunction with other circumstances." But again he said in the same case: "If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without a remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision." These last words prepare one for his decision, three years later, in the case of *Bray* v. *Bray* (1), where Sir John Nicholl, in admitting an article that a husband had falsely charged his wife with incest said: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife." I think it manifest that this learned judge, having regard to his language in these three cases, cannot be cited as an authority who would have accepted the definition of the Court of Appeal in this case.

The case of *Paterson* v. *Paterson* (2) is of the highest significance in this controversy, having regard to the directness of the decision and the fact that it was the judgment of this House. Speaking with great deference, I do not think (as I have said in a former case decided by your Lordships) I would myself have arrived at the same conclusion as Lord Brougham on the facts, but I feel bound to acknowledge the force of the authority of this House on the question of law decided. He laid down in the most absolute terms, "That the ground of the remedy is confined to personal violence is not the law of England, and certainly not the law of Scotland. The law is nearly, if not altogether, the same in the two countries. It is not true that the law of England either requires actual injury to the person, or threat of such injury." Lord Brougham, in the Order of your Lordships' House, inserted the most distinct repudiation of the view of the Lord Ordinary, that nothing but personal violence, or the menace of it, would suffice as a ground of divorce. It is not suggested that in this respect there is any

(1) 1 Hagg. Ecc. 163. (2) 3 H. L. C. p. 325; 7 Bell's App. 337.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Ashbourne.

difference between the law of England and the law of Scotland. Putting it at the lowest, no one can rely upon this decision of your Lordships' House as giving any warrant for adopting the absolute and unqualified definition found in the judgment of Lopes L.J.

The two decisions of Sir Cresswell Cresswell, so much cited, after the Act of 1857 do not appear to entirely harmonise, and can only be reconciled on the ground that he confined himself in each to its special facts, and was not thinking in either of laying down any general principles or attempting the difficulty, from which so many other great judges had shrunk, of formulating a definition. In *Tomkins* v. *Tomkins* (1), which was a case where considerations of personal violence and menace and their degree were present, this learned judge, in instructing the jury, said: "Danger of life or limb, or health has continued, in substance, the rule upon which the Courts have acted." His judgment in *Milner* v. *Milner* (2) shews that he could not have intended in the earlier case to have laid down any general rule that would stand the test of being applied to all facts. It was a suit for divorce on the ground of adultery and cruelty. The charge of cruelty turned upon the fact that the wife had followed the husband in the street, when he behaved to her in such a way that led bystanders to think her a prostitute, and to insult her. The words of Sir Cresswell Cresswell as to this were clear and emphatic: "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face . . . . It is a case of the grossest and most abominable cruelty." It is manifest that the judge who used these words was not prepared for the definition of the Court of Appeal.

Lord Penzance in *Pickard* v. *Pickard* (3) somewhat extended the area of consideration in holding that the Court should guard against "perils of provocation." The case of *Kelly* v. *Kelly* (4) shews that the jurisdiction was not limited to personal violence, and that relief would be given where conduct undermined health. All this goes to shew the necessary elasticity of the

(1) 1 Sw. & Tr. 168, at p. 171.
(2) 4 Sw. & Tr. 240.
(3) 33 L. J. (P. & M.) 158.
(4) L. R. 2 P. & D. 59.

term "cruelty," and how impossible it is to lay down any safe or sufficient definition of cruelty. Can relief be made in all cases dependent upon health? Is a person whose health suffers from the strain of prosecution, malevolence, and worry to be given relief, and another person be denied it, under circumstances of greater malignity and atrocity, merely because his constitution was better and his courage more robust?

I adopt to the fullest extent the judgment of Lord Stowell in *Evans* v. *Evans* (1), and think (1.) that there must be "grave and weighty causes" for a finding of cruelty; (2.) that "what merely wounds the mental feelings is in few cases to be admitted"; (3.) that what falls short of personal danger "is with great caution to be admitted." He indicated what, according to the general experience of mankind, would be the general rule, taking care to use words which would not exclude from special consideration exceptional cases, when there was "no bodily injury, either actual or menaced," but using warning words as to the necessity in such cases of "great caution."

Are the facts of this case special and exceptional, and such as should be recognised as cruelty, even after the greatest caution? What are these facts? The cruelty alleged and proved consists of false charges of abominable and infamous criminal offences put forward in the most deliberate way in judicial proceedings by the wife, withdrawn by her counsel in open court, reasserted by her with a view to publication in the press, and put forward and persisted in by her in a long correspondence under circumstances which a jury has found not to be bonâ fide. She might have let the withdrawal of Sir Edward Clarke stand, and then I would not concur in the charge being subsequently treated as cruelty. But in "*The Hawk*" and in correspondence prolonged over years she has put forward this odious charge, when it is not suggested she believed in it, and when a jury has found she was not acting bonâ fide.

Accepting, as we are bound, the findings of the jury, the books do not disclose a cause "more grave and weighty," a charge more ruinous, an accusation more calculated to destroy his life, his prospects, and his friendships, and make the husband

(1) 1 Hagg. Cons. 35.

H. L. (D.)
1897
RUSSELL
v.
RUSSELL.
Lord Ashbourne.

an outcast and a pariah. In the words of Lord Stowell, is it not equal to the "strong act of cruelty" in *Popkin* v. *Popkin*? (1) In the language of the same great judge, is it not equal to the "gross cruelty" of *D'Aguilar* v. *D'Aguilar*? (2) To use the words of Sir John Nicholl in *Bray* v. *Bray* (3), can any one conceive cruelty of a more "grievous character"? In the words of Sir Cresswell Cresswell in *Milner* v. *Milner* (4), is it not "a case of the grossest and most abominable cruelty"?

In attempting to lay down a definition, the Court of Appeal have departed from the cautious example of Lord Stowell, whilst in its terms they have departed from the judgment of Lord Brougham.

To my mind, the general rule and practice with its necessary qualifications have been wisely laid down by Lord Stowell, and in the records of our courts the "great caution" which he inculcated has been applied. It is, I venture to think, dangerous now for the first time to attempt to frame a definition of cruelty, and it may in some cases lead to the exclusion of "grave and weighty causes," and therefore to much hardship to some who with all due caution might be admitted to relief.

In my opinion, the judgment of the Court of Appeal was wrong, and I concur with the Lord Chancellor that the appeal should be allowed.

LORD HERSCHELL. My Lords, the appellant in this case seeks a judicial separation from the respondent on the ground of her cruelty. It must be taken, on the findings of the jury, that the respondent alleged without cause that the appellant had been guilty of an abominable offence, and that she persisted in asserting it without an honest belief in its truth. The sole question is whether this amounts to cruelty in point of law, so as to entitle the appellant to a judicial separation.

The 20 & 21 Vict. c. 85, under which the existing Divorce Court obtained its jurisdiction, provides, by s. 22, that in all suits and proceedings other than proceedings to dissolve any

(1) 1 Hagg. Ecc. at p. 768.
(2) 1 Hagg. Ecc. 773.
(3) 1 Hagg. Ecc. 163.
(4) 4 Sw. & Tr. 240.

marriage the Court shall proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief. The question, therefore, to be solved is, What were the principles and rules upon which the Ecclesiastical Courts acted in granting a divorce à mensâ et thoro on the ground of cruelty prior to the year 1858?

It was conceded by the learned counsel for the appellant, and is, indeed, beyond controversy, that it was not every act of cruelty, in the ordinary and popular sense of that word, which amounted to sævitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief could not be obtained. When once this is conceded, it obviously becomes necessary to ascertain what was meant by sævitia, or cruelty, in the Ecclesiastical Courts, when regarded as a ground for divorce. It was contended that it is impossible exhaustively to define "cruelty." Whether this be so or not, it is manifestly necessary to determine what elements were treated as essential to the constitution of the sævitia, or cruelty, which entitled to a divorce.

It has been usual, whenever this question has arisen for consideration, since the year 1790, to commence with a reference to the statement of the law to be found in Lord Stowell's judgment in *Evans* v. *Evans* (1), decided in that year. "What is cruelty?" he said. "In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty: they affect not only the comfort, but they affect the health and even the life of the party. This, however, must be understood, that it is the duty of the Courts to keep the rule extremely strict. The causes must be grave and weighty, and such as to shew an absolute impossibility that the duties of married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and obligation; but what falls short of this is with great

(1) 1 Hagg. Cons. 35.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

caution to be admitted." The learned judge then discusses the effect of words which wound the mental feelings, whether natural or acquired, and afterwards proceeds thus: "These only shew what is *not* cruelty. But if it were at all necessary to lay down an affirmative rule, I take it the rule cited by Dr. Bever from Clarke and the other books of practice is a good general outline of the Canon law, the law of this country upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof being given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done." It has been contended that the test of cruelty which Lord Stowell here supplies is whether the circumstances are such as to shew an absolute impossibility that the duties of married life can be discharged, and that the condition of personal danger produced by violence or threats is given only as an illustration, and is but one of many circumstances which would equally satisfy the test. I shall have presently to discuss the value of the suggested test. But I remark in the meantime that I am unable thus to interpret Lord Stowell's language. If the view contended for be correct, what does he mean by speaking of the danger to life, limb, or health as the ground for a separation as a "doctrine repeatedly applied by the Court," or by the assertion that the "Court has never been driven off this ground"? The language used obviously implies that attempts had been made to induce the Court on some other ground than this to afford relief for alleged cruelty. Why had the Court refused to be driven off this ground if it was but one of several which were comprehended within the broad general rule said to be enunciated as the test of cruelty?

The next authoritative exposition on the subject of cruelty is

to be found in the case of *Westmeath* v. *Westmeath*. (1) In his judgment in this case, in the year 1826, Sir Christopher Robinson spoke of danger to life, limb, or health as "the ordinary criteria of legal cruelty in these courts." And in a later part of the same judgment he used this language: "On an attentive comparison of all the cases that have been alluded to, I think I may affirm that the Ecclesiastical Courts have hitherto been uniformally strict in requiring proof of actual injury or of real apprehension of injury as it may affect the safety or health of the person to justify a divorce on the ground of cruelty." It is scarcely possible to imagine language more explicit than this; and the words of Sir J. Nicholl, when in the following year, he had to consider the case of *Westmeath* v. *Westmeath* (1) on appeal are not less so. He sets himself to inquire what is "the law that applies" to a charge of cruelty, and propounds the question thus: "What constitutes cruelty in the view of the law?" After quoting from Lord Stowell's judgment in *Evans* v. *Evans* (2), he proceeds: "So in *Harris* v. *Harris* (3) 'There must be something which renders cohabitation unsafe, or is likely to be attended with injury to the person or to the health of the party.' Again, in *Waring* v. *Waring* (4) the usual principles require that such complaints should be supported by proof of violence and ill-treatment, endangering, or at least threatening, the life, or person, or health of the complainant. The same doctrine is held in the case of *Holden* v. *Holden*." (5) After quoting some passages from the judgment in that case, he adds: "These, then, are the principles by which these Courts have been governed; and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury." It is to be observed that these observations of Sir John Nicholl are not merely interposed in the discussion of the facts of the particular case. Before dealing with these he considers what is the law he is to apply, and seeks an answer to

(1) 2 Hagg. Ecc. Supp. at pp. 55, 56, 57, 61, 69, 70, 71.

(2) 1 Hagg. Cons. 35.

(3) (1813) 2 Hagg. Cons. 148; 2 Phill. 111.

(4) 2 Hagg. Cons. 153; 2 Phill. 132.

(5) (1810) 1 Hagg. Cons. at p. 458.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

the question what is the nature of the cruelty which will justify a decree of divorce.

Again, in *Neeld* v. *Neeld* (1), a few years later (1831), Dr. Lushington had to decide whether, assuming the facts stated in the libel to be true, a case of cruelty was established. "The main test," he said, "which I must apply is whether the facts with which Mr. Neeld is now charged are of the nature and description to satisfy my mind that cohabitation can no longer subsist between the parties without personal danger to Lady Caroline Neeld. In these suits the species of facts most generally adduced are,—first, personal ill-treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness a fear of personal injury. For causes less stringent than these the Court has no power to interfere and separate husband and wife; it is necessity alone which has conferred on the Ecclesiastical Courts that power, and in regard to self-protection alone must the exercise of that power be guided." Later on he says: "Short of personal violence or reasonable apprehension of it, I have no power to interfere." Trying the case by these tests, the learned judge refused relief although the libel disclosed conduct on the part of the husband towards his wife of no small outrage and indignity.

I turn now to the authorities which are supposed to favour a less stringent exercise of the jurisdiction of the Courts. In some of these cases the question which had to be decided was the admission of articles, and it must be borne in mind that it was the practice of the Ecclesiastical Courts to plead evidence. Each article did not necessarily contain a statement of facts sufficient to warrant the decree asked for. It was admissible if it disclosed relevant facts bearing on the charge which was the foundation of the suit. And it would seem that any act of cruelty in the popular sense of that term would be admissible as throwing light on, and proper to be considered in connection with, more serious charges. It is clear, therefore, that the decision that an article was admissible as containing a statement

(1) 4 Hagg. Ecc. at p. 265, 271.

of facts relevant to a charge of cruelty can by no means be regarded as deciding that the facts so stated would of themselves have justified a divorce. It is further to be observed that, especially in dealing with the admission of articles, the judges have not infrequently, when speaking of acts as "cruel," used that word in its popular sense, and not as indicating that the acts were cruel in the legal acceptation of the term—that is to say, such as would entitle to a divorce. An instance of this is to be found in *Popkin* v. *Popkin* (1), where the libel charged the husband with habitually frequenting brothels, and attempts to debauch his women-servants in his own house. Lord Stowell said: "The attempt to debauch his own women-servants was a strong act of cruelty, perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings." Here it is obvious that Lord Stowell must have used the word "cruelty" in its popular and not in its legal sense, for it would be nonsense to speak of cruelty in the latter sense as "perhaps not alone sufficient to divorce."

Some observations of Lord Stowell in *D'Aguilar* v. *D'Aguilar* (2) have been much relied on. In the course of a discussion as to the admissibility of the articles in that case, he is reported to have spoken as follows: "The article proceeds to state minute acts. I think they may be better stated in a general way: they throw a levity on the business when pleaded, and are more proper to come from the witnesses. As to spitting on her, nothing can be more gross cruelty, and there is a case in Hetley in which a prohibition was denied, the only act of cruelty pleaded being spitting on the face, and that was adjudged sufficient." It is to be remembered that the learned judge was here dealing only with the admissibility of the articles. They contained ample statements of acts of undoubted cruelty. When he says that spitting on the wife was "gross cruelty," he was, I am satisfied, using that word in its popular and not in its technical sense. It was quite unnecessary for him to consider whether the act would of itself warrant a divorce; all that he had to decide was whether it was a relevant

(1) 1 Hagg. Ecc. at p. 768. (2) 1 Hagg. Ecc. 773, at p. 776.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

statement. It is impossible to suppose that the learned judge intended, in the year 1794 (the date of the decision in *D'Aguilar* v. *D'Aguilar* (1)), in using the language he did, to depart from the ground from which, only four years before, he said the Court had never been driven, and this, too, without making any reference to his former exposition of the law, or giving any reason for a change of view or for taking a new departure. I cannot but doubt whether the report can be regarded as accurate, for, if it be so, the observation attributed to the learned judge with reference to the case in Hetley (2) is very inaccurate. The only act of cruelty pleaded was, not "spitting on the face." The complaint was, "that he gave her a box on the ear and spat in her face, and whirled her about and called her a damned whore." It is not easy to disentangle the opinion of the Court from the arguments of counsel. But it is clear that the prohibition was not denied because "spitting on the face" was adjudged a sufficient allegation of cruelty. The ground on which the prohibition was claimed was that the husband "chastised his wife" for a reasonable cause by the law of the land, as he might, which they denied, and said that they had jurisdiction in these matters de sævitia. The result is stated thus: "But the plaintiff they advised to tender a justification, and if they refused it, then to move for a prohibition." In the course of the report the following passage occurs: "We cannot examine what is cruelty or not. And certainly the matter alleged is cruelty; for spitting in the face is punishable by the Star Chamber." The reason is noteworthy. It can hardly be contended that this is a test of cruelty sufficient in law to warrant a divorce. And the observation that it was for the Ecclesiastical Court, and not for the courts of common law, on an application for a prohibition, to determine what was cruelty appears perfectly sound.

It is true that in the case of *Saunders* v. *Saunders* (3), in 1847, where the husband was charged with spitting in his wife's face, Dr. Lushington, after alluding to the doubts which had been cast in the course of the argument on the authority of the case

(1) 1 Hagg. Ecc. 773. (2) (1630) Cloborn's case, Hetley, 149.
(3) 1 Rob. Ecc. 549, at p. 562.

in Hetley, said that there could be no more competent judge on such a question than Lord Stowell. But Dr. Lushington did not decide the case on the authority of Lord Stowell's supposed decision or dictum in *D'Aguilar* v. *D'Aguilar*. (1) He said: "I will look at such behaviour, however, even with more technical strictness. Is it possible to imagine that when a husband has proved himself so utterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly, that he would when his passion was excited restrain himself within the bounds of the law, and that his wife would be safe under his control? *Threats* of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to a threat, for it proves a malignity of feeling which would require only opportunity to shew itself in acts involving personal danger, but never surpassing in cowardly baseness." It is needless to discuss this view of the facts; but it is a clear recognition that "technical strictness" required that the Court should be satisfied that personal danger to the petitioner was involved before it could grant a divorce. It was only to be expected that this view should be taken by a judge who had, a few years before in *Neeld* v. *Neeld* (2), so clearly and unequivocally defined the conditions requisite to justify a divorce.

Another dictum much relied on is found in the report of *Bray* v. *Bray* (3), which came before Sir John Nicholl in the year 1828. That, again, was the question of the admission of articles. The learned judge said: "The third article is intended to establish not merely a declaration of the husband, but a solemn affirmation on oath of a part of the charge brought against him, namely, asserting, before and after the birth of the child, that that child was not his, but the fruit of an incestuous connection between Mrs. Bray and her uncle. Though that may be admitted in the husband's answer, the wife is not bound to defend on the chance of that admission. It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by

(1) 1 Hagg. Ecc. 773. (2) (1831) 4 Hagg. Ecc. at p. 265.
(3) 1 Hagg. Ecc. at p. 167.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

this husband against his wife." I may observe that your Lordships were furnished with the proceedings in the case, and that the articles contained charges of undoubted cruelty. It is clear to my mind that Sir John Nicholl here used the word "cruelty" in its popular and not in its technical sense. I have formed this opinion not merely because the former is the sense in which the word is usually and properly used when the question in controversy is the admission of articles, but also from the considerations to which I will now advert. Three years earlier the same learned judge had, in *Durant* v. *Durant* (1), to consider what conduct would revive condoned adultery. The husband in that case had ordered his doors to be shut against his wife, a mother with twelve living children, and made and persisted for years in an utterly unfounded charge of adultery against her. After intimating that he was inclined to hold that cruelty would revive condoned adultery, the learned judge said: "Here is not 'cruelty which would support a sentence propter sævitiam,' but here is an act which might be pleaded as such in conjunction with other circumstances." He thus draws a sharp distinction between acts which may be pleaded as cruelty in conjunction with other circumstances, and those which are of themselves sufficient to support a sentence, and he places an utterly unfounded charge of adultery persistently made in the former category. Reliance has been placed on a passage in the same judgment where the learned judge used the following language: "Is there any woman who would not have considered an act of personal violence inflicted in passion, or even deliberately and maliciously, trivial and pardonable in comparison with this accusation—a charge made not in the haste and error of the moment, but kept up and persevered in to the present time? If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision." This passage, however, had reference to the question whether the acts of the husband, even though not amounting to cruelty which would warrant a divorce, were sufficient to revive the

(1) 1 Hagg. Ecc. 733, at pp. 769, 770.

adultery which had been condoned. This was the point on which the learned judge reserved his opinion, and not on the question whether the acts would justify a sentence of divorce, on which, as I have shewn, he had distinctly expressed an opinion in the negative. It was only the year before Sir John Nicholl's observations in *Bray* v. *Bray* (1) that he gave the elaborate exposition of the law of cruelty in *Westmeath* v. *Westmeath* (2) from which I have already quoted. He cannot have intended in the following year, by the language under discussion, to indicate a different view of the law. Moreover, it seems clear that he was not so understood by those who were conversant with the practice of the Ecclesiastical Courts, and with the distinction between the acts which might be pleaded as cruelty in the articles and those which would support a divorce. For in the case of *Gale* v. *Gale* (3), decided in 1852, the counsel who were supporting the libel argued that where substantial acts of cruelty were alleged, as in that case, it was allowable to plead also matters which wound the feelings, and that a false charge of incest was a grievous aggravation of cruelty. And Sir John Dodson in giving judgment said: "Undoubtedly the charge of having committed incest is not, per se, sufficient to constitute legal cruelty, but, coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form part of a libel."

Much importance has been attributed, and I cannot but think undue importance, to some remarks made by Lord Brougham in delivering his opinion in this House in the case of *Paterson* v. *Paterson*. (4) It will be well first to notice what was decided in that case. The Lord Ordinary had embodied in his interlocutor the view that nothing but personal violence or the menace thereof would suffice as a ground for divorce. This was decided to be an erroneous statement of the law. Beyond this nothing was determined except that the petitioner had not established a case of cruelty, although it was shewn that her husband shortly after the marriage had withdrawn from her

(1) 1 Hagg. Ecc. 163.
(2) 2 Hagg. Ecc. Supp. at pp. 69, 70.
(3) 2 Rob. Ecc. 421.
(4) 3 H. L. C. at p. 328; 7 Bell's App. 337.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

society and avoided her, was constantly to be found in his sister's company, declared that he would never renew cohabitation with his wife, refused to allow her family to associate with her, and threatened them with violence if they attempted to do so. But in the course of his speech Lord Brougham, saying that there was no case which went further than Lord Stowell went in the passage I have quoted from *Evans* v. *Evans* (1), proceeded to say: "but, nevertheless, there is so much dictum, there are so many opinions or inclinations of opinion ventilated which have a tendency to go further, that if a case were to arise such as the ingenuity of some of the learned judges in Scotland in this case supposed, I have very little doubt that we should find the rule considerably extended; and that that which now only rests upon opinions more or less distinctly mooted and ventilated would assume the form ultimately of a decision, namely, that if the husband, without any violence or threat of violence to the wife, if the husband, without any maltreatment endangering life or health, or tending or leading to an apprehension of danger to life or health, were to use mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless, charges of this kind made before her family, her children, her relations, her friends, her servants, insulting her in the face of the world and of her servants, calling upon those servants to join in those insults and to treat her with contumely and with scorn—if such a case were to be made out, or even short of such a case, which would make the marriage state impossible to be endured, which would make life itself almost impossible to be endured, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce à mensâ et thoro to a case such as that." I may observe in passing that I can hardly conceive conduct more likely to affect the health of a woman than that described by Lord Brougham. The language I have quoted is, it has been urged, a declaration by the noble and learned lord that the true test, in point of law, is not whether there is injury or danger of

(1) 1 Hagg. Cons. 35.

injury to person or health, but whether it is possible under the circumstances that the marriage state can be endured. It seems to me, on the contrary, to be a clear recognition of the fact that ever since the Ecclesiastical Courts had exercised the jurisdiction of divorce down to the year 1850 (when Lord Brougham was speaking) the test of danger to person or health had always been applied. And it is no more than a speculation of Lord Brougham, who cannot be regarded as specially an authority on the ecclesiastical law, as to whether the Courts would not in the case he put relax the rigour of the rule on which they had theretofore acted. In truth, I cannot regard those remarks as of any weight at all towards the elucidation of the question what is the nature of the acts which warrant a divorce on the ground of cruelty. I should have thought, indeed, that the marriage state might have been truly said not to be "endurable," to use Lord Brougham's word, and the discharge of marriage duties impossible, if those be the tests, under the treatment to which the appellant in the case with which Lord Brougham was dealing subjected his wife, and yet her petition for relief was of no avail.

One argument I ought to notice before I review the authorities. The Court, it was said, could only refuse restitution of conjugal rights on grounds which would justify a decree of divorce, and it was further said that it would be monstrous to pronounce a decree for restitution and enforce it by imprisonment in such a case as this, and that therefore there must exist sufficient ground for a divorce. I find myself unable to accept this as a guide to the determination of the question whether cruelty entitling to a divorce has been established. I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than the case of *Holmes* v. *Holmes* (1), decided in 1755, which is relied on for the proposition that the Courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most revolting character on the part of the husband was held to afford no answer to his claim for a restitution of conjugal rights.

(1) 2 Lee, 116.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court might well refuse to afford its assistance to one who acted thus. And notwithstanding the decision to which I have referred, there are not wanting dicta of eminent judges, and notably of Lord Stowell, that "something short of legal cruelty" might bar a suit for restitution. However that may be, the matter is of less importance than it formerly was, as the Legislature has interposed; and even if the Court is still bound to make a decree for restitution, it is no longer bound to enforce it as before.

Upon a review of the authorities prior to the time when the Divorce Act came into operation, I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced. I can find no case in which the impossibility that the duties of married life could be discharged was treated as the criterion. If it be the true criterion, it is scarcely conceivable that circumstances should not have occurred for its application during the period, more than a century, covered by reported cases. Indeed, if in the present case a separation ought to be decreed because, under the circumstances, the discharge of the duties of married life must be regarded as impossible, would their discharge not be impossible in just the same sense where a husband persisted in charging his wife with adultery without cause, or falsely accused her of incest? And yet we have an emphatic declaration by eminent judges in

both these cases that such conduct would not warrant a divorce on the ground of cruelty.

So far I have dealt only with the authorities prior to 1858. These are the really important ones. The Court for Matrimonial Causes is governed and controlled by a distinct statutory injunction. It can only act and give relief on principles and rules as nearly as may be conformable to the "principles and rules" on which the Ecclesiastical Courts had "theretofore acted and given relief." But the principle or rule that a judicial separation can only be granted on the ground of cruelty where there has been injury to body or health, or the reasonable apprehension of it, has been frequently recognised and acted upon since 1858. The law has never been enunciated in other terms, and no other test has been suggested as the correct one. The Act came into operation on January 11, 1858. On May 5 following, in the case of *Tomkins* v. *Tomkins* (1), Sir Cresswell Cresswell in the course of the argument said: "I rather apprehend that in such a case as this I shall be bound to direct the jury what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not. Here I imagine the issue is cruelty or no cruelty, and I shall have to inform the jury what cruelty is." When the learned judge came to sum up he said: "It will be my duty to endeavour to point out what the law on such questions is, as now for the first time juries have to deal with these matters. Lord Stowell's judgment in *Evans* v. *Evans* (2) is the great authority on questions of legal cruelty." After reading passages from that judgment ending with that with which I have concluded my quotation, the learned judge proceeded thus: "Danger of life, limb, or health has continued in substance the rule upon which the Courts have acted; the phrase has sometimes been varied. Sir John Nicholl has used the expression 'injury to person or to health,' which I am inclined to take in conjunction with Lord Stowell's expression, for there might be a great deal of suffering and brutal usage without coming strictly within the terms of the latter. There must, however, be bodily hurt,—not trifling or temporary pain; or a reasonable apprehension of

(1) 1 Sw. & Tr. 168.
(2) 1 Hagg. Cons. 35.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

bodily hurt. It will be for you to determine whether the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health." This is a clear, and, I apprehend, an accurate statement of the law administered by the Ecclesiastical Courts. It has been suggested that it was not a complete exposition of the law, but merely such a statement as was necessary, having regard to the facts proved in the particular case. I am unable so to regard it. It purports to inform the jury what legal cruelty is. The learned judge speaks of danger of life or limb, or health as "the rule on which the Courts have acted." There is, surely—I say it with respect—a fallacy in speaking of the law laid down as sufficient for the purposes of the particular case. If acts which did not involve danger to person or health would have entitled the jury to find that cruelty had been established, if the real question was whether the circumstances were such as to render the discharge of marriage duties impossible, the judge was, I think, bound so to direct the jury. Moreover, so far as I can discover, Sir Cresswell Cresswell never gave any jury a different direction from that to be found in *Tomkins* v. *Tomkins* (1), or expounded the law otherwise. Nor has your Lordships' attention been called to any different exposition of the law on the part of his successors. How deeply rooted the notion was that personal safety was the only ground for the Courts' interference is shewn by the cases of *Pickard* v. *Pickard* (2) and *Forth* v. *Forth* (3), where Lord Penzance granted a judicial separation on the petition of the husband on the ground that the husband was likely to be incited to acts of violence by his wife's conduct, and that if he refused to relieve from the perils of provocation there would be no security for the safety of the wife. I may refer, as one of the later cases on the subject where the law is to be found laid down, to the judgment of Lord Penzance in *Milford* v. *Milford*. (4) In spite of profligate conduct on the part of the husband, the knowledge of which he seems to have ostentatiously

(1) 1 Sw. & Tr. 168.
(2) 33 L. J. (P. & M.) 158.
(3) 36 L. J. (P. & M.) 122.
(4) (1866) L. R. 1 P. & D. 295, at p. 299.

obtruded upon his wife, the learned judge refused a decree, saying: "The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it: the Court, as Lord Stowell once said, has never been driven off this ground; nor do the cases cited, whatever general expressions may have fallen from the Court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread."

With one possible exception, not a single case has been cited since 1858, any more than before that date, in which a decree has been granted on any other ground. The case to which I refer is *Milner* v. *Milner* (1), which came before Sir Cresswell Cresswell in 1861. The husband had taken his wife by the shoulders, pushed her against a wall, and thrust his umbrella against her person, in consequence of which passers-by took her for a prostitute. The learned judge granted her a divorce. The husband had previously committed acts of violence towards his wife, though not for some years. It is to be observed that the respondent did not appear, and therefore no argument was addressed to the Court against the prayer of the petition, and that the counsel for the petitioner argued that the insult to the petitioner was of so gross a character as to render further cohabitation outrageous to the feelings of the wife, and therefore likely to be injurious to her health. Whether the learned judge adopted this view, or thought that, having regard to the previous conduct of the husband, the wife's safety was endangered, it is impossible to say. He did not enter upon any discussion of the law, and, beyond saying that the respondent had been guilty of as great an indignity as if he had spat in his wife's face, gave no reasons for his judgment. Such a decision obviously cannot be regarded as having any important bearing upon the question. What were the principles and rules upon which the Ecclesiastical Courts acted? It is much more significant that it is the only case which the research of

(1) 31 L. J. (P. & M.) 159; 4 Sw. & Tr. 240.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Herschell.

counsel has been able to produce in which it can be even plausibly contended that relief has been given on a ground other than danger to person or health.

I am certainly not indisposed to arrive at the conclusion that the appellant has established a case for a judicial separation. But in laying down a proposition of law on such a subject as that with which your Lordships are dealing, it is necessary to keep in view the consequences, and not to contemplate only its operation in the particular case. The only criterion of cruelty which I have heard suggested as warranting a judgment for the appellant is whether the discharge of the duties of married life has become impossible owing to the conduct of the respondent. How is the word "impossible" to be interpreted in the proposition thus stated? Obviously not as confined to physical impossibility, or it would not cover the present case. If it be extended to what is sometimes called "moral" impossibility, a proposition could scarcely be conceived more elastic. It would afford no sort of guide, but would, in my opinion, unsettle the law and throw it into hopeless confusion. Views as to what is possible, or in this sense would differ most widely. Though in some instances most men would, no doubt, concur in their opinion, yet, speaking generally, the determination of the case would depend entirely upon the particular judge or jury before whom it might chance to come. Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when, in short, the ordinary marital relations no longer prevailed. The opinion may be held by many that it would be well that in all such cases a judicial separation should be granted—that relief should be always given where the prospect of happiness so long as the parties cohabited appeared hopeless. But these are considerations for the Legislature, and not for the Courts. If divorce à mensâ et thoro is to be extended beyond the limits within which it has hitherto been confined, the change must, in my opinion, be made by legislation. Our duty on the present occasion is to administer and not to make the law.

I have no inclination towards a blind adherence to precedents.

I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterised the last century in this respect, there has been no alteration—no new development. I think it is impossible to do otherwise than proceed upon the old lines. I cannot bring myself to say that if we were to yield to the appellant's contention we should be acting and giving relief on principles and rules conformable to the principles and rules on which the Ecclesiastical Courts formerly acted. And this we are by statute enjoined to do.

For these reasons I am of opinion that the judgment of the Court of Appeal should be affirmed.

LORD MACNAGHTEN. My Lords, I only rise for the purpose of expressing my entire concurrence in the judgment which has just been delivered by Lord Herschell, and I do not desire to add anything to it.

LORD MORRIS. My Lords, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Pollock B. restored. The reasons for my arriving at that conclusion are fully set forth in the judgment of my noble and learned friend Lord Ashbourne, which I have had an opportunity of seeing and considering, and which I entirely adopt.

LORD SHAND. My Lords, two alternative views have been presented by the parties as to the principle or rule which should be applied in the decision of this case, in answering the question whether the respondent has been guilty of such cruelty as the law holds to be sufficient to entitle the appellant to a decree of separation.

The great importance of the case as affecting the rights of husband and wife in their marital relations lies in the determination of the question which of these alternatives is to be adopted, not merely as between the parties to this suit, but as fixing the criterion by which future cases must be decided.

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Shand.

It is maintained by the appellant that the question to be put and decided in such cases on the issue of cruelty is whether the conduct of the husband or wife complained of has been such as to make continued cohabitation impossible. The alternative maintained by the respondent is that the conduct complained of must be such as to have caused danger, or a reasonable apprehension of danger, to life, limb, or health. Outside of these two views, or within them, as presenting two extremes, no third criterion or rule has been suggested either in the argument or in the judgments either of the Court of Appeal or of your Lordships.

The view which has been taken by my noble and learned friends, Lord Ashbourne and Lord Morris, that a case like the present, in which the cruelty may be described in popular language as "gross cruelty" or cruelty of a "most grievous character,"—and so may be treated in an exceptional manner apart from any rule or criterion,—appears to me to give no third test, unless it be that of the "circumstances of the case," which, with great deference, would not supply any guide for the decision of future cases. I do not see what can be the line which would distinguish between cases of cruelty and cases of gross cruelty.

In deciding which criterion of the two suggested by the parties is to be taken as expressing the law as it now exists, the courts of law are by the Act of 1857 required to proceed on principles and rules as nearly as may be those on which the Ecclesiastical Courts acted previous to the passing of that statute.

The difficulty in the decision of the question is sufficiently shewn by the close division of opinion, not only of the judges who have hitherto dealt with it, but also in your Lordships' House. After the most anxious consideration,—and while I should have been far from unwilling, if I could do so with safety to the law to be applied in other cases, to hold that the respondent's scandalous and atrocious conduct entitled her husband to the decree he asks,—I have come to the conclusion that the appellant has failed to establish such cruelty as the law recognises as sufficient. It appears to me that the result of the

authorities, so fully considered in the opinion which has been delivered by my noble and learned friend Lord Herschell, is that the rule or principle for which the respondent contends, and to which effect has been given in the judgment of the Court of Appeal, is that on which the Ecclesiastical Courts acted previous to the statute, and is now the law; and that, however truly it may be said that the respondent has been guilty of cruelty in a popular or wide sense of the term, it has not been shewn that there has been cruelty in the sense which the law requires as a ground of divorce or separation.

It would be idle repetition again to go through the stream of authorities on the subject, and to analyze or criticise the various forms of expression used with reference to the meaning to be given to the term "cruelty" as applicable to the particular and varying circumstances of so many cases. In many cases, and particularly those in which questions arose as to the admission of articles for proof, it appears to me that the word is used in the opinions or judgments in a popular sense. Where however the criterion came to be stated in the determination of the merits of the cases, having regard to the facts in evidence, that criterion was danger or apprehension of danger to life or health,—which it must be observed, with reference to much of the argument for the appellant, is a much more comprehensive term than physical violence, and a term which has, I think, been found sufficient to cover all the cases in which hitherto relief has been granted.

It is true that in many cases learned judges have used expressions that the conduct of the husband or wife complained of has made domestic life intolerable or impossible. On examination of the cases, however, it will, I think, be found that these words are used, if not in all, yet in most instances where it has been shewn that danger or apprehension of danger to health has been proved as a ground for action. In such cases every one will be agreed that it is quite correct and true to say that continued cohabitation has become impossible. If I am right in so thinking, this is very far indeed from making "the continued cohabitation of husband and wife impossible" (with all the vagueness which must attend the application of so

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Shand.

loose a criterion to the facts of each particular case) a safe or satisfactory standard in the determination of the question of cruelty.

It is indeed only because I desired to add a few words to what has been already said on this subject that I have ventured to trouble your Lordships with any observations.

Questions of divorce or separation are now frequently tried before juries. Suppose the presiding judge, in the direction he gives, to tell the jury that the test they are to apply in reaching their verdict must be, "Has the conduct of the wife or husband been such as to make continued cohabitation unbearable or impossible?" I should certainly expect that the jury would ask for some direction much more precise and definite; and without such a direction I should say the law would be involved in much confusion and uncertainty. Is each of the jury, according to his own views of the principles which should guide the conduct of married persons, and of the particular conduct proved, to determine for himself as to whether cohabitation has or has not become impossible? A guide is given if the judge is able to say that future cohabitation must be with safety to the husband or wife complaining, and that a reasonable apprehension of danger to life or health cannot consist with the idea of safety. But if this criterion is not to be supplied, what is to take its place? A judge must, I think, be prepared either in directing a jury, or in making up his own mind where the decision rests with him, to formulate in some way the elements which in his view are sufficient to bring the case up to one in which it can be predicated that further joint domestic life has become impossible; and the fatal defect in the argument of the appellant appears to me to be that it entirely fails to provide any test or criterion to be applied in the solution of that question. If the appellant's argument be well-founded, it would not be necessary to aver or to shew that any apprehension of danger to health existed. What is there to take the place of this? Is it to be enough that great mental distress and pain will be suffered, or that the spouse complained of has acted so as to destroy all affection, and to create even a horror of future intercourse? The present is a flagrant, pro-

bably an unprecedented case, where so foul and loathsome a charge has been made and persisted in without belief in its truth on the part of the wife; but many cases might be figured and must occur in which circumstances far short of this would in the opinion of many jurymen make future cohabitation intolerable. A husband or wife might never cease to introduce and press subjects of conversation which would necessarily cause extreme irritation and mental distress—might never cease to use reproaches for past moral misconduct with the same result—might constantly use language opprobrious and insulting, or continuously make unfounded charges of moral misconduct or even criminal offences of a serious character, though much less grave than the respondent in this case made. In such cases, if it should be shewn that injury to health results, or reasonable apprehension of such injury exists, the law will give a remedy, for that is a criterion to which an appeal can be made and which admits of application. Without such a criterion there must be the utmost uncertainty, for it must be left to the judge or to the jury to form his or their own notion of what conduct will or will not make continued domestic life impossible, with the single qualification,—itself admitting of great diversity of views,—that the conduct complained of must be of a grave, weighty, and serious character. These considerations seem to me fully to account for and to justify the observation of Lord Stowell in the case of Evans, so often quoted, when he said with reference to the criterion of injury or apprehended injury to health: "The Court has never been driven off this ground."

It has been argued that the issue of impossibility of continued domestic life, without any guide or criterion of the proof necessary to establish this, is not unlike issues which raise questions of honesty, or malice, or the like which are constantly tried. The case of malice is not a very happy illustration by way of parallel, for there is perhaps no term in the law which has given rise to more diversity of opinion or more litigation from the loose way in which it has been used, sometimes in its ordinary and popular meaning of hatred or ill-will and a desire to injure as a motive, which is easily understood without any

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Shand.

direction, and at other times in a sense in which the existence of such a motive is not necessary. But when the term is used to describe anything short of malicious motive, it is certainly necessary for the judge to define the particular meaning to be ascribed to it in its legal sense in the particular case. In an issue of fraud, again, there is no difficulty, such as occurs in reference to impossibility of cohabitation. Every one at once understands the meaning of a false and fraudulent representation. No words of definition would be better than these words themselves. An intention to deceive, successfully carried out, is a term clear in itself which admits of no better elucidation than the words supply—whatever may be the difficulty in particular cases of saying whether the fraudulent motive and deceit have been in fact proved.

Holding, then, as I do, that the majority of the Court of Appeal were right in applying the test or criterion they did to the facts of the case, I agree in thinking the appellant's case fails. It is true that the conduct of the respondent cannot be condemned in terms too strong. The persistence in gross charges of foul immorality, the truth of which she did not believe, charges which were calculated so deeply to wound her husband's feelings and to degrade him in the eyes of the world, was cruelty—I should even say gross cruelty, in a wide and popular sense of the words. It has not, however, been shewn that her conduct was such as the law holds to be requisite to entitle the appellant to a decree of divorce or separation,—for it cannot be said that injury, or apprehended injury to, the appellant's health has resulted.

It has been decided that in consequence of the respondent's conduct she has now forfeited all right to restitution of legal rights. She cannot therefore require that cohabitation should be resumed; and this decree has become final. If the respondent could have insisted on cohabitation, it might have been said that the probability of such charges being persistently repeated by her in the appellant's presence might lead to his doing violence to her in his anger; but the risk of this having been removed, there is no reason for granting a decree of separation on this ground, as was suggested in the course of the appellant's argument.

I am on the whole of opinion that the judgment of the Court of Appeal ought to be affirmed. If it should be thought desirable that a different rule or principle of law from that which has hitherto prevailed should in future receive effect, the change must be brought about by legislation, which in any view should either give some other criterion of cruelty than that which now exists, or should make something short of cruelty,—in the sense which the law has attached to that term in questions between husband and wife,—a ground for granting a decree of divorce, or at least of separation.

LORD DAVEY. My Lords, the only act of cruelty upon which the appellant relies as entitling him to a judicial separation is the publication of a libel upon him imputing to him an infamous crime without any belief in the truth of the imputation. It must be admitted that this is a gross outrage by one person upon another, and an abominable action of a wife towards a husband. But the question is whether it constitutes what has been called legal cruelty such as will by itself entitle the appellant to demand a judicial separation.

In answering this question it is important to bear in mind the legal proposition or definition of legal cruelty for which the counsel of the appellant contend, and the conditions under which the Court has to approach the consideration of the question and test the soundness of the appellant's proposition. To take the latter point first: the Court is not entitled to adopt its own view of what degree or kind of cruelty, or what description of behaviour or conduct by one spouse towards another, should be a ground of judicial separation. But by s. 22 of the Divorce Act, 1857, it is thrown back upon the principles acted on by the Ecclesiastical Courts in the exercise of their jurisdiction before the Act, and in order to constitute a ground for judicial separation the behaviour or conduct complained of must be of such a description as before the Act would have entitled the complaining spouse to a divorce à mensâ et thoro in the Ecclesiastical Courts. The reported decisions of these Courts have been cited to us or commented on with great ability by counsel on both sides of the bar. The general idea

H. L. (D.) 1897 RUSSELL v. RUSSELL. Lord Davey.

which, I think, underlies all those decisions is that, while declining to lay down any hard and fast definition of legal cruelty, the Courts acted on the principle of giving protection to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health.

What, then, is the proposition for which the appellant contends? Sir Robert Reid's proposition was that cruelty is such wilful infliction of bodily or mental pain as is calculated to render matrimonial relations unendurable. And the learned counsel added that there is no legal limitations as to the character of the cruelty, though it must be gross in degree. It must be remembered that these cases are now tried by a jury; and, therefore, Sir Robert Reid's proposition is that whatever conduct, in the opinion of a jury properly directed, causes bodily or mental pain such as is calculated to render matrimonial relations unendurable is legal cruelty. I will not weary your Lordships by going through or analyzing the cases cited. I only desire to say that many of the cases cited were upon admission of articles in which allegations were held admissible as aggravation or as evidence of intention, though not alone or in themselves affording substantive ground for relief. I agree generally with the opinion expressed by Lord Herschell on the effect and result of the authorities cited.

In my opinion Sir Robert Reid's proposition goes far beyond anything which had been laid down by the learned judges of the Ecclesiastical Court before the Divorce Act, and appears to me to be very far-reaching in its possible application. I express no opinion whether the Court ought or ought not, as a matter of policy, to give relief on that principle. My only duty is to say whether the appellant's contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief. I am constrained to say that in my opinion it is not, and I see no reason to differ from the reasons given by the majority of the judges in the Court of Appeal. There is no question here of personal violence, and in the circumstances of the case I see no evidence of any apprehended injury to the appellant's physical or mental health against which he requires protection. To use the words of Lord Stowell, "The

respondent's conduct is a high moral offence in the marriage state undoubtedly, not innocent, surely, in any state of life, but still it is not that cruelty against which the law can relieve."

H. L. (D.) 1897 RUSSELL v. RUSSELL.

Appeal dismissed with costs.

Lords' Journals, July 16, 1897.

Solicitors for appellant; *Vandercom, Hardy, Oatway & Doulton.*

Solicitors for respondent: *Valpy, Chaplin & Peckham.*

[HOUSE OF LORDS.]

SINCLAIR'S DIVORCE BILL.

H. L. (D.) 1897 *Feb.* 26; *May* 7, 11; *July* 2.

Divorce Bill—Definitive Decree of Divorce—Action for Criminal Conversation—Standing Orders, Nos. 175, 177*—Domiciled Irishman—Jurisdiction of the English Court—Evidence taken in India.*

Great caution ought to be observed in allowing a petition for divorce to proceed in the English Divorce Court where there is ground for supposing that the parties are domiciled out of the jurisdiction.

It is not necessary for the first reading of an Irish divorce bill that a definitive sentence of divorce à mensâ et thoro should have been pronounced in the Irish Courts.

Where in the proceedings upon an Irish divorce bill it appears that no action for criminal conversation has been brought against a co-respondent who was not domiciled and could not be served in Ireland, the House of Lords may allow the bill for divorce to be received.

Where there is no means of enforcing the warrant of the House of Lords to take evidence in parts of India, the evidence as taken and used in a previous suit in the English Court of Divorce may be allowed to be used quantum valeat.

BILL to dissolve the marriage of Alfred Law Sinclair, of Holyhill, Strabane, county Tyrone, Ireland, a lieutenant-colonel in the Indian Staff Corps, with Isabella Sinclair, his wife, on the grounds of her adultery in India; to enable the petitioner to marry again; and for the alteration of their marriage settlement.

The marriage took place in India on March 4, 1878, the petitioner being then, and now, a domiciled Irishman; the

H. L. (D.) 1897 SINCLAIR'S DIVORCE BILL.

respondent being a domiciled Irish woman. In contemplation of the said marriage a settlement was executed in December, 1877, by which shortly it was stipulated that the income of the petitioner's portion of the fund should be paid to him for life, and after his death to the respondent for life if she survived; and after the death of the survivor of the marriage the trustees were to hold the fund for the benefit of the children of the marriage as the petitioner and the said Isabella Sinclair should by deed or will jointly appoint; and in default of such appointment, as the survivor should appoint; and in default of any such appointment, in trust for all or any of the children or child of the marriage equally who attained twenty-one, &c.; and in default of such children, as the petitioner should by deed or will appoint; and in default, over to his brothers and sisters. Provided that if the petitioner survived the said Isabella Sinclair, it was to be lawful for him at any time after her death to appoint (if there should be not more than one child, &c.) half the income of the petitioner's fund to be paid after his death to any wife he might marry after the death of the said Isabella Sinclair for the life of such wife or any less period; and further to appoint, if there should not be any more than one child, &c., of the said marriage, that any part of the said trust fund not exceeding one-half thereof (subject to any appointment of the income thereof for any future wife) should after the petitioner's death be held in trust for the children or child of such future marriage as he should appoint as therein declared. Then, as to the respondent's marriage portion, it was declared that the interest should be paid to the petitioner for life, and after his death to the respondent should she survive him; and after the death of the survivor the trustees were to hold the fund for the children of the marriage, as the petitioner and the said Isabella Sinclair should jointly appoint, and in default of appointment for the children equally; and if no children attained the age of twenty-one, &c., in trust for the respondent's executors, &c., should she survive the petitioner, but if she predeceased the petitioner, in trust for the person or persons she should appoint by deed or will, and in default of appointment for such persons as under the Statute

of Distributions would have been entitled had she died intestate and unmarried.

The petitioner and respondent resided together until March, 1883, in various parts of India, where the petitioner was stationed on duty; there being now living one child of the marriage.

In March, 1883, the respondent, while the petitioner was away on service, left the petitioner's home, and went to reside with Richard Humphrey Tyacke, then an officer in the army, but now retired.

On August 9, 1883, the petitioner presented a petition in the Divorce Division, England, for divorce and the custody of the child. The petitioner described himself as of Holyhill, Strabane, in the county Tyrone, Ireland. He thus described himself as a domiciled Irishman; but the suit being undefended, it appears that no questions were asked by the President, Sir James Hannen, as to the jurisdiction of the Court; nor at that time did anybody raise any questions.

On December 28, 1883, the English Divorce Court made an order that the deposition of Major Rodwell and Major-General Nicolson as to the adultery of the respondent with R. H. Tyacke should be taken on commission in India. And the Court, having these depositions before it and the evidence of the petitioner, granted on July 15, 1884, a decree nisi, which decree was made absolute on January 27, 1885. There was no appearance whatever for the respondent or co-respondent. On March 16, 1885, the respondent went through the form of marriage with the said Richard Humphrey Tyacke at Dover, and had ever since lived with him as his wife, and is known as Mrs. Tyacke. On April 19, 1886, consequent on the decree dissolving the marriage, the English Divorce Court made an order modifying the trusts of the marriage settlement, to the effect that the trustees from the date of the order should pay and apply the funds brought into settlement by the petitioner and the income thereof as if the respondent were dead; and, further, ordered that they should, during the life of the respondent, pay her the income of the trust funds brought into settlement by or on her behalf, and from and after her death

H. L. (D.) 1897 SINCLAIR'S DIVORCE BILL.

should pay the said trust funds and the income in pursuance of the trusts of the said marriage settlement following on the death of the respondent; and it was further ordered that all powers of appointment reserved to the said respondent in respect of all trust funds comprised in the settlement should cease and determine. The effect of this was that by arrangement the respondent's income was paid to her and the petitioner's income paid to him; and also that he should deal with the property as if the respondent were then dead. The trustees seem to have raised some objection to the validity of the order, whereupon, on motion, on July 12, 1887, the President took a strong view upon the point, and told the trustees they were absolutely protected by the decree; and that it was too late to raise any question; and thereupon the matter rested.

The petitioner was now desirous of marrying again, and to make a settlement upon his marriage; but the trustees of the settlement refused to act, contending that, inasmuch as the petitioner and the respondent had at the date of the English decree an Irish domicil, the decrees of the English Court were made without jurisdiction, and were null and void, and that the petitioner's marriage had never been legally dissolved. Under these circumstances, and being advised that there was considerable doubt as to the validity of the decrees, the petitioner on April 8, 1896, filed a petition for a divorce à mensâ et thoro against the respondent in the Probate and Matrimonial Division, Ireland. On October 28, Warren J., not wishing to make any order questioning the validity of Sir James Hannen's decrees, gave the petitioner the alternatives, either to retain the papers pending an application to this House as to whether he should make a decree, or to dismiss the petition. The latter the petitioner chose to have done. All the evidence was gone into before Warren J., and he held that the adultery of the respondent had been fully proved.

On December 2, 1896, the Court of Appeal in Ireland (FitzGibbon, Barry, and Walker L.JJ.) were unanimously of opinion that the petitioner had done enough in Ireland to present a bill of divorce to this House, and they made an order

retaining the appeal pending an application for an Act annulling the petitioner's marriage, with liberty to re-enter the appeal for further consideration if necessary.

No action of criminal conversation was brought against Richard Humphrey Tyacke, the petitioner being advised that such action would not lie in Ireland, R. H. Tyacke not being domiciled there, nor was he at any time in Ireland when he could have been served.

FIRST READING.

1897. Feb. 26. *Austen-Cartmell*, for the petitioner. The present application is that the petition may be received. All the proceedings in England and Ireland have been lodged in this House, and it is submitted that the Standing Order No. 175 (1) has been complied with.

[LORD HALSBURY L.C. How was it that there was no strict inquiry in the Divorce Court as to whether the domicil of the parties was inside or outside the jurisdiction: *Le Mesurier* v. *Le Mesurier*? (2)]

There was no appearance at all for the respondent or co-respondent. No action at law was taken in Ireland against R. H. Tyacke because at the time both parties to the adultery were out of the jurisdiction. But this is no bar to the bill, because if no such action is brought the reasons are stated to the House on the second reading. So in *Martin's Divorce Bill* (3) the opinion of this House was that Standing Order No. 177 (4) does not make it a condition precedent that

(1) No. 175: "No petition for any bill of divorce shall be presented to this House unless an official copy of the proceedings taken or had in the court having jurisdiction over matrimonial causes at the place of his domicil, or residence, or in some other court having jurisdiction in that behalf, at the suit of the party desirous to present such petition, be delivered upon oath at the Bar of this House at the same time."

(2) [1895] A. C. 517.

(3) (1847) 1 H. L. C. 79.

(4) No. 177: "When any petition for any bill of divorce has been presented to this House in any case in which any trial at nisi prius has been had, or any writ of inquiry executed within the United Kingdom wherein the petitioner has been party, the judge or under-sheriff before whom such trial has been had, or such writ of inquiry executed, shall transmit to

H. L. (D.) 1897 SINCLAIR'S DIVORCE BILL.

there should have been an action at law. Then has there been a compliance with Standing Order No. 175? Now there is nothing outside the Standing Orders themselves which indicates that proceedings must have been taken in order to give the petitioner a locus standi to present a petition to this House.

[LORD HERSCHELL. If in the old days a spouse brought an action in the Ecclesiastical Courts and a decision was given that there was not sufficient evidence, the bill could still be received here. For this House never treats a decision in the Court below as conclusive, or as indeed shewing sufficient evidence to support the case of the petitioner. This House always requires to be satisfied itself by the evidence, and therefore there does not seem any reason why, even if the petition had been dismissed in the Court below, that the bill should not be received here.]

The old Standing Order of March 28, 1798 (No. 141) (1) is now No. 175. Under the old order it was necessary to have a "definitive sentence," but in the modern order, which was adopted March 24, 1871, after the establishment of the Matrimonial Court, that term "definitive sentence" is omitted. The sentence, "and of a definitive sentence of divorce à mensâ et thoro in the Ecclesiastical Court," is struck out and these words, "taken or had in the Court having jurisdiction over matrimonial causes at the place of his domicil or residence, or in some other Court having jurisdiction in that behalf," are inserted. It is simply the term "proceedings" which remains. Under the Standing Order of 1798 it was assumed that the proceedings on a decree must be laid upon the table of the House. Under the Standing Order of 1871 the phraseology is intentionally altered, and this House does not require as a condition precedent either that there should have been proceedings taken at all, or that, if proceedings are to be taken, those proceedings shall culminate in a decree. In fact, it is unnecessary

---

the Clerk of the Parliaments to be laid upon the table of this House a report of the proceedings upon such trial or writ of inquiry, and no such bill of divorce shall be read a second time until such report has been so laid upon the table of this House."

(1) See for this Order, Macq. H. L. 791.

in order to enable a petitioner to present a petition to this House that there should be a decree laid upon the table of the House at all. Nor, if proceedings have to be taken, is it necessary that those proceedings should be completed. Standing Order No. 178 supports this contention. (1)

[LORD HALSBURY L.C. On the second reading, if the petitioner has brought before this House all the "proceedings" that in fact have been taken, that puts the House to inquire what has been done in those proceedings. Then, if those proceedings have not been completed, the House, on the second reading, would require to know why they had not been continued.]

Yes. Further, the Standing Orders do not require as a condition precedent for the bill, that there should be any proceedings at all.

LORD HALSBURY L.C. I do not think it necessary to express any opinion as to the exact effect of the Standing Orders; but I think the rules have been complied with in these proceedings.

THE HOUSE (Lord Halsbury L.C., Lords Herschell, Macnaghten, and Morris) read the bill a first time.

May 7, 11. *Austen-Cartmell*, for the petitioner, applied that the evidence contained in the depositions of Major Rodwell and Major-General Nicolson, taken on commission in India in

(1) No. 178: "Upon the second reading of any bill of divorce, the petitioner praying for the same shall attend this House, in order to his being examined at the Bar, if the House think fit, whether there has or has not been any collusion, directly or indirectly, on his part, relative to any act of adultery that may have been committed by his wife, or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentence of divorce had in any court for matrimonial causes at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife; and also whether, at the time of the adultery of which such petitioner complains, his wife was, by deed, or otherwise by his consent, living separate and apart from him, and released by him, as far as in him lies, from her conjugal duty, or whether she was at the time of such adultery cohabiting with him, and under the protection and authority of him as her husband."

H. L. (D.) 1897 SINCLAIR'S DIVORCE BILL.

pursuance of an order of the English Divorce Court, be received in evidence on the second reading: these officers being at the present moment in India on duty, and therefore unable to be present on the second reading to give evidence.

The evidence these gentlemen gave fourteen years ago is of a collateral circumstance tending to the proof of the adultery, and of such a character as would enable the House to admit the respondent's confession. The other alternative is that they should now be examined again in India, and that the proper warrants should be issued for that purpose by this House under 1 Geo. 4, c. 101. But the second alternative cannot be carried out, for Major Rodwell is stationed at Dalhousie, in the Punjab, and Major-General Nicolson at Mhow, Indore, Central India. It is true that for the examination of witnesses in India—1 Geo. 4, c. 101—gives power to either House of Parliament to issue a warrant to the judges of the Supreme Courts of Judicature of the Presidencies of Calcutta, Madras, and Bombay, or the judges of the Supreme Court of Ceylon respectively, accordingly as the witnesses proposed to be examined shall be resident within any one or more of the said Presidencies or the said island. The India Office, on the suggestion of your Lordships made on May 7, has informed the petitioner that neither of the above districts—Dalhousie or Mhow—is within the Presidencies named in the Act 1 Geo. 4, c. 101, and, as far as they are able to ascertain, the Act does not seem to apply to this particular case. 24 & 25 Vict. c. 104 abolished the three Supreme Courts as then existing, and provided that letters patent under the Great Seal of the United Kingdom should be issued to create three new High Courts: ss. 1–8. Then, by s. 16, Her Majesty might at any time hereafter by letters patent under the Great Seal of the United Kingdom erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court. In accordance with that, letters patent were issued creating the High Court of the North-Western Provinces. These four are the only High Courts in existence in India which have been created by letters patent

under the Great Seal of the United Kingdom. The Court in the Punjab is the "Chief Court" of the Punjab, and was created, not by letters patent, but by an Act of the Indian Legislature by virtue of 24 & 25 Vict. c. 67. This "Chief Court of the Punjab," created and since amended by various Acts of the Indian Legislature, is the supreme Appellate Court of the Punjab, and appeals lie direct from it to the Privy Council. Therefore the Punjab "Chief Court" is not in any way a successor of the Supreme Court of Bengal mentioned in 1 Geo. 4, c. 101; it follows that there is no jurisdiction in the "Chief Court" if a warrant were issued to it from this House to execute that warrant for the purpose of examining witnesses. The same applies to Mhow, Central India. Mhow is a British cantonment; but it is situate in Central India, which is a conglomeration of Native States and nothing else. There is no High Court. There is merely a British agent. No doubt there is the British cantonment, and the British troops form part of the Bombay army; and it might possibly be contended that Mhow was within the Bombay Presidency, inasmuch as it is said that wherever British troops are there the British jurisdiction is carried; but it is impossible to say that a district which is within the Native States can be held to be within the Presidency of Bombay. In both cases, therefore, the Act of 1 Geo. 4, c. 101, has no application. There are statutes which enable evidence to be taken in India under a commission issued by a "court" in this country; but this House sits as a legislative body, and does not sit as a court so as to issue commissions under the statutes which empower courts of justice to issue commissions. On these grounds and to save expense the petitioner asks this House to accept these depositions as evidence. This House, sitting as a legislative chamber, can take, subject to the Standing Orders, any evidence that it thinks fit, requiring only to be satisfied on reasonable proof that the acts complained of in the petition for the bill have in fact been committed.

THE HOUSE (Lord Halsbury L.C., Lords Watson, Macnaghten, Morris, and Davey) were of opinion that the depositions might be admitted as evidence quantum valeat.

H. L. (D.)
1897
SINCLAIR'S BILL.

SECOND READING.

July 2. *Samuels, Q.C.* (of the Irish Bar), and *Austen-Cartmell*, for the petitioner, stated the above facts and read letters written by the respondent dated May 4, 1883, Cashmere, and of subsequent dates, in which she admitted her guilt. They also produced the original of the evidence taken in the English Divorce Court, and read extracts from the depositions of the two officers above mentioned shewing that the respondent and co-respondent lived together at Lucknow and other places in India as husband and wife. They then asked that the marriage settlement should be altered to the effect sanctioned by Sir James Hannen, which was agreed to. They further pressed that if possible the divorce should be made retrospective to the date of Sir James Hannen's decree to validate the respondent's marriage with the co-respondent, of which marriage there had been no children.

[LORD DAVEY. The lady married on the faith of there being a good decree of divorce.]

Samuels, Q.C. Yes; and everybody acted on that belief for years.

[LORD HERSCHELL. Still there is no difficulty as it is. If any children had been born it would have been rather a serious question; but as there are no children there is no practical difficulty. It can be remedied by a second marriage.]

Samuels, Q.C. I do not suppose that your Lordships will consider it necessary under the circumstances to discuss the validity or invalidity of the English decree.

[LORD HALSBURY L.C. No.]

THE HOUSE (Lord Halsbury L.C., Lords Watson and Herschell) held that the petitioner had made out his case; and the bill was read a second time; and eventually passed through both Houses, and received the Royal assent on August 6, 1897.

Solicitors for petitioner: *Pollock & Co.*

[HOUSE OF LORDS.]

PERTH GENERAL STATION COMMITTEE . . . . . } APPELLANTS;

AND

ROSS . . . . . RESPONDENT.

H. L. (Sc.) 1897 May 11, 13, 17, 24; July 27.

Railway—Right of Railway Company to exclude from the Station Persons other than Travellers—Exclusion of Hotel Servant wearing Hotel Badge—Trespass—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31)—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48).

Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway; and may impose upon the rest of the public any terms they think proper as the condition of admittance. And it follows that a railway company who have an hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform with the condition that on those occasions no hotel servant shall wear a distinctive badge or livery.

So *held* (Lord Morris dissenting), reversing the decision of the Second Division of the Court of Session.

The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or privilege belongs exclusively to the Railway Commissioners.

APPEAL from a decision of the Second Division of the Court of Session in Scotland. (1)

The facts are sufficiently given in the opinion of Lord Watson.

May 11, 13, 17, 24. *Asher, D.F.*, and *Balfour, Q.C.* (of the Scottish Bar), for the appellants. The appellants were incorporated by the Perth General Station Act, 1865, and the property of the general station at Perth and the works and premises connected therewith are vested in them. They hold the station for the use of the North British, Caledonian, and Highland Railway Companies, whose trains arrive at and depart from the station. The appellants are composed of representatives nominated by the said companies.

The question is whether the appellants, as owners of the

(1) 23 R. 885.

H. L. (Sc.)
1897
PERTH GENERAL STATION COMMITTEE v. ROSS.

station, are not entitled to prevent persons from entering the station, who come, not as passengers or as intending passengers, nor for the purpose of transacting business with the appellants or the said companies, but only to accompany others who are to be passengers, or to meet others who are expected to arrive as passengers, by the trains departing from or arriving at the station.

The appellants contend that they are the absolute owners of the station except in so far as their rights are modified by statute, or facilities are granted by the Railway Commissioners. They have the power to exclude all persons not passengers or desirous of using the railway who attempt to enter the station without their permission. There is no doubt that it is to the interest of the appellants to give every reasonable facility; but as the absolute legal right has been claimed, they contest the right of any individual to send hotel servants, either with or without uniforms, on to the platform to meet passengers: see *Case* v. *Storey*. (1)

[LORD MACNAGHTEN mentioned *Barker* v. *Midland Ry. Co.* (2)]

That case shews that it is only the person who can or is about to contract with the company who can make objection at common law to exclusion: see also *Beadell* v. *Eastern Counties Ry. Co.* (3); *Painter* v. *Brighton and South Coast Ry. Co.* (4); *Ilfracombe Public Conveyance Co.* v. *London and South Western Ry. Co.* (5) The right claimed here is not a right belonging to a passenger, nor has any passenger put forward a complaint; it is the landlord of an hotel who is insisting on the right of his servant to be on the platform. If the respondent, as an hotel proprietor or as a member of the public, claims facilities, he cannot bring his action for them at common law until he vindicates his right to them before the Railway Commissioners: Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48).

(1) (1869) L. R. 4 Ex. 319, 326.
(2) (1856) 18 C. B. 46.
(3) (1857) 2 C. B. (N.S.) 509; 1 Nev. & Mac. 56.
(4) (1857) 1 Nev. & Mac. 58.
(5) (1868) 1 Nev. & Mac. 61.

The first finding of the Court of Session (1) is a special finding of the fact: 6 Geo. 4, c. 120, s. 40; and if the thing which the respondent has done is a trespass, the appellants are entitled to an interdict against that thing being repeated. There being no special circumstances found, if the finding is correct it is a general affirmance of the right of everybody to do the same; but it cannot be admitted that even every passenger has a right to have a friend to meet him on the platform. It is not found that the respondent's "boots" went to the station at the request of a passenger, or that that would be a reasonable request of a passenger to make; nor is anything found as to the services which the "boots" rendered, or was intended to render. In fact, the finding only comes to this—that persons had intimated that they were coming. But the only right passengers have is to travel according to the public professions held out to them by the railway company, which do not include the right to be met.

As to the interdict originally asked (2), it can be modified, or a declaration made, the form of the application being sufficient to apply the law. Wherever an illegal act has been done and threatened to be repeated, a court of equity will interfere. The question is, Has the respondent a legal right to do the thing he asserts a right to do in his letter of July 1, 1895, namely, that he was resolved to send his "boots" to the station wearing the badge and uniform of his hotel, whereby his customers might be attended to on arrival. The appellants contend that he has not this absolute legal right; and there is no difficulty in restraining the respondent from doing what he claims a right to do.

[They also cited *Johnson* v. *Midland Ry. Co.* (3)]

The Hon. F. Thesiger, for the respondent. It can be inferred from the findings that on each occasion the respondent sent his "boots" to the station, passengers had intimated their intention of coming. The respondent claims the right to be on the platform through the right of the passenger who intends to arrive. It is necessary to see what facilities railway companies

(1) Given in Lord Watson's opinion.

(2) See Lord Watson's opinion.

(3) (1849) 4 Ex. 367, 372.

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS.

hold out to travellers. If a passenger is an invalid, the company holds out to him that he will be allowed to be attended by his attendant; if a child, the company always allows its guardian to meet it at the arrival platform. They allow a servant to meet his master. They also allow a passenger to be met by an omnibus or a carriage. Relying on this usage, which has grown up and which the railways have fostered, the hotel "boots" must be held to be upon the platform at the invitation of the appellants. The respondent does not threaten to come upon the platform, but says the appellants, having invited him, through the passengers, to use the station, the appellants cannot prohibit the respondent's "boots" from wearing a particular badge and uniform. By 3 & 4 Vict. c. 97, s. 16, there was a summary remedy of arrest and trial before a justice for the alleged trespass; which proceeding ought to have been adopted.

[LORD WATSON. To have this point decided by a magistrate would have been most inconvenient.]

The interdict asked is too vague and general; and, if granted in those terms, the respondent would be particularly interdicted, and more so than the "boots" from any other hotel. [He cited Jessel M.R. in *Mulliner* v. *Midland Ry. Co.* (1) and *Marriott* v. *London and South Western Ry. Co.* (2)]

Asher, D.F., in reply.

The House took time for consideration.

July 27. LORD HALSBURY L.C. My Lords, in this case I have no doubt whatever of the power of the station committee to regulate the use of the station—"To regulate it even in the case of passengers actually going and arriving"; and these words I have quoted from the judgment of the Lord Justice Clerk. His Lordship adds that they must be subject nevertheless to being put right if they take any steps in the "regulation of the station which are not truly steps of reasonable regulation, but steps which they have no right to take." And so far I do not differ if those words point to the station committee of the rail-

(1) (1879) 11 Ch. D. 611, 619.
(2) (1857) 1 C. B. (N.S.) 499; 1 Nev. & Mac. 47.

way company itself being set right by the appropriate tribunal. But I am of opinion that the station is absolutely the property of the railway company, and that the rights of the railway company are just as absolute in the first instance as those of any other proprietor. That by appeal to the appropriate tribunal they may be compelled to permit passengers and traffic under a variety of conditions under proper orders of Court is true; but that against their will any member of the public has a right to force himself upon the platform or into the booking-office I cannot agree.

The public has a right to go, and has a right to enter into a contract with them; and the railway company may be compelled if they refuse, either by action at the suit of the complaining party or by an application to the Railway Commissioners. But I should be sorry to throw any doubt on the absolute right of the railway company in the first instance to regulate their own traffic in their own way, and to refuse access to their station under the circumstances stated in this case. Of course it would be represented as a ludicrous exercise of authority to prescribe the dress in which persons may approach their station; but I can quite understand the inconvenience which might result to the passengers, that is to say, to the public, if, apart from the annoyance of actual solicitation of custom for various hotels outside, the persons who rush in to solicit custom should do it by conspicuous badges describing the hotel to which they belong.

I do not believe that any actual inconvenience to the public can result from the recognition of the right of the railway company to carry on their business in their own way. Their own interest is the best security that their strict legal right will not be abused.

I think there would be some difficulty in framing an interdict in the language originally asked, but the order which your Lordships have agreed to is such that I think no inconvenience will arise; and I am of opinion that the interlocutor appealed from ought to be reversed, and the order which your Lordships have agreed upon, which is as follows, substituted: [His Lordship then read the order at the end of this report.]

H. L. (Sc.) 1897 — PERTH GENERAL STATION COMMITTEE v. ROSS.

LORD WATSON. My Lords, this appeal is from a judgment of the Second Division of the Court of Session, which recalls, and in substance reaffirms, two interlocutors pronounced in the Sheriff Court of Perthshire by the sheriff-substitute and the sheriff. Your Lordships are, therefore, bound to treat the findings of fact contained in the interlocutor appealed from as having the force and effect of the special verdict of a jury. The effect of these findings cannot, in the present case, be fully appreciated without referring to the circumstances which gave rise to the litigation, which appear on the face of the record, and are not in dispute.

The respondent, Alexander Ross, is a hotel-keeper, being tenant of the Royal British Hotel, Leonard Street, Perth, in the vicinity of the general railway station, the property and management of which are vested by statute in the appellants, for behoof of certain companies who use the station for the purposes of their traffic. Until the date of this action the appellants, who have a hotel of their own within the limits of the station, permitted all the hotel-keepers in Perth, including the respondent, to have free access to the platforms by themselves and their servants, for the purpose of accompanying their guests to the train by which they were departing, and of meeting them upon their arrival; but that privilege was qualified by the condition that no servant should, on these occasions, wear a distinctive badge or livery.

The respondent was dissatisfied with the condition, of which he admittedly had notice, and on July 1, 1895, he intimated by letter to the appellants' station-master, "I am resolved to send my 'boots' to Perth General Station wearing the badge and uniform of my hotel, whereby my customers may be attended to on arrival here, as they are at other railway and steamboat stations over the country." That intimation was followed up by the respondent sending his "boots," with badge and uniform, to the passenger platforms on numerous occasions during the month of July, 1895, who on all these occasions refused to leave the station when requested to do so by the officials of the appellants.

On July 26, 1895, the appellants presented a petition to the

Sheriff Court of Perthshire at Perth, craving to have the respondent, by himself or by his servants, interdicted (1.) from unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the appellants; (2.) in particular from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the Royal British Hotel; and (3.) from waiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel. The respondent by his defence denied that he or his servants had committed any trespass, and alleged that the object of the appellants in preventing hotel servants from coming to their platforms with badges, or in uniform, was to give a preference to their own Station Hotel, to his prejudice. His fifth plea in law is to the effect that "the object of the petition being an attempt to restrict the liberty of the defender Ross, or his servants, in the matter of wearing a uniform or badge, is illegal, and the pursuers are not entitled to interdict."

A proof was led before the sheriff-substitute, who, on February 13, 1896, issued an interlocutor containing various findings of fact and law, by which he refused the prayer of the petition. The basis of the decision is indicated in one of the learned judge's findings, which is to the effect that the appellants, "as proprietors of said station, hold their said property under the condition of their not preventing its convenient use by any member of the railway travelling public, or with the presence therein of the keeper or servants of the hotel where such traveller has been staying, or which he may propose to go to, except in so far as is necessary for the proper management and control of the station and for the securing of which the pursuers have power to make such regulations or by-laws as they may think necessary." The learned judge appears to have been of opinion that, it not having been proved to his satisfaction that the presence of the respondent in the station by himself or his servants, interfered with the proper control and management thereof, their exclusion would, in point of law constitute an illegal interference with the convenience of the members of the railway travelling public. The sheriff, on

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS. Lord Watson.

April 17, 1896, affirmed the judgment of his substitute, apparently in deference to these or similar considerations.

On appeal to the Court of Session, the Second Division of the Court, on June 26, 1896, by the judgment submitted to review, recalled the interlocutors of the sheriff and his substitute, and found in fact, "(1.) That the defender did not, by himself or his servants, enter the pursuers' station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at the defender's hotel; and (2.) that neither the defender nor his servants ever caused any obstruction to or inconvenience at the pursuers' station." Their Lordships found in law, upon these findings of fact, that the appellants were not entitled to interdict, and they therefore refused the petition, with expenses in the Court of Session and in the inferior court.

The logical connection between these two findings of fact, and between them and the conclusion of law which is deduced from them, is not supplied by any finding, and is not very apparent. The first would be a pertinent finding if it could be affirmed that every hotel-keeper and his servants have, at common law or by statute, an absolute right to enter any railway station and use its platform, if they go there for the purpose of accompanying or meeting passengers who are either leaving or have intimated an intention of coming to their hotel, so long as their presence does not cause obstruction or inconvenience. In that case it would be within the competency of an ordinary court of law to enforce such legal right. It is obvious that the second finding might apply, with equal truth, to many persons who enter a station without having any legal right to do so. The judgment, as framed, does not deal directly with that which is the real and only question in the case, namely, what legal right has the respondent to use the general station at Perth without the leave and against the will of its proprietors? As to the views entertained by the learned judges of the Court of Session upon that point, very little information can be gleaned from the opinions which they delivered at the advising of the case. I find in all of them great stress is laid upon the circumstance that it is within the power of the appellants, if they

think fit, to frame regulations for the use of their station, and to submit them for the sanction of the Board of Trade; and that these regulations, if approved of by the board, will be enforceable under penalties. Some of the learned judges have expressly said, whilst others have plainly suggested, that the proper course for the appellants, in dealing with such claims as are advanced by the respondent, is to proceed by way of regulation, subject to the sanction of the Board of Trade, and not by interdict in a court of law. I cannot concur in that opinion. It appears to me that such regulations are only intended to govern the conduct of those persons whom the owner of the station cannot exclude, or whom he may choose to admit. When their right is permissive merely, and the permission is conditional, I can see no reason why, in order to enforce the condition, a regulation sanctioned by the Board of Trade should be required. I do not think it was intended by the Legislature that the Board of Trade, in sanctioning regulations of that kind, should have jurisdiction to determine what members of the public, if any, being neither travellers nor interested in goods traffic, shall have the right to use a station, or what facilities are to be allowed to those who are entitled to use it.

The claim which the respondent sets up is, in substance, that he and his hotel servants have an absolute legal right to enter upon and use the passenger platforms of Perth General Station without observing the conditions which the appellants have attached to their admission. In my opinion, that is a claim beyond the cognisance of a court of law, which can only deal with legal rights as they exist, and not with rights as they might possibly have existed if the Railway Commissioners had been applied to, and had affirmed their existence. The learned sheriff-substitute, in affirming by his interlocutor as one of the grounds of his decision that the recognition of the respondent's claims to their full extent would be of convenience to members of what he terms the railway travelling public, does not seem to have thought that he was invading the province of the Railway Commission. Yet it hardly admits of doubt that jurisdiction to determine, in the first instance, whether the respondent

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS. Lord Watson.

has a statutory title to demand the privilege which he claims and, in the event of his having a title, to determine whether and how far his claim ought to be allowed, belongs exclusively to the commissioners. Accordingly, these are questions with which I conceive that I have nothing to do in the present case, and upon the merits of which I desire to express no opinion.

Apart from any facilities which might by possibility be given him by the Railway Commissioners, whose intervention has never been invoked either by the respondent or by any one in his behalf, has the respondent any right, capable of being legally enforced, to use the appellants' station at all, or upon any other conditions than the appellants choose to prescribe? That is the cardinal question in this case, and one to which I cannot find that any attempt has been made to give a satisfactory reply in the Courts below. The respondent makes no claim as one of the members of the travelling public, or as a person interested in goods conveyed by rail to or from the appellants' station. His counsel, in the absence of any materials for a stronger argument, very fairly and plausibly maintained that the respondent was invited to use the station, and that, when using it in response to such invitation, he could not be deprived of his natural liberty to clothe his servant with any badge or garment which he chose; and also that the adoption of an hotel badge or uniform was required in the interest and for the convenience of railway travellers who were to arrive at the station on their way to his hotel. The first of these arguments fails, because it is not shewn that any invitation was held out to the respondent which was not coupled with the intimation that he was not to send any servant to the station with a badge or uniform. As regards the second, it is sufficient for the purposes of this case to say that the respondent is not one of the railway travelling public who frequent his hotel. So far as appears, none of them have complained that facilities to which they were entitled have been withheld from them by the appellants; and, even if they had just cause of complaint, they could have no redress except by an application to the Railway Commissioners.

It is no doubt true that whilst the appellants are vested with

the ownership and administration of the station, their statutory powers were conferred upon them by the Legislature, as in the case of railway companies, with a view to the accommodation of the public. But the Legislature has not committed to the ordinary tribunals of the country the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a railway or a station has reason, or without reason thinks fit, to complain that some facility which he ought to have has been withheld from him, and that an undue preference had been shewn to others in the same position, a court of law can give him no remedy. He must resort to the tribunal which the Legislature has constituted for that purpose, the Railway Commissioners; and, until they have decided in his favour, he is not in a position to say, and no Court would be justified in holding, that he stands possessed of the right which he asserts.

His claims to use the appellants' station, which have been maintained in defence by the respondent, appear to me to be in excess of any legal right which he possesses. In my opinion, so long as there is no decision to the contrary by the Railway Commissioners in an application to them by some person having a proper title, it is within the discretion of the appellants either to exclude him and his servants from the station, or to admit them upon such conditions as may be thought fit. The right of the respondent, if he can be said to have any right, must depend upon the extent of the licence accorded to him by the appellants. It might have been a reasonable course, had it been adopted at an earlier stage of these proceedings, to stay the present suit until the respondent had an opportunity, either by himself or through some other person having a more direct interest, of endeavouring to bring his claims, such as they are, under the consideration of the Railway Commissioners. But, seeing that the respondent has persisted in relying upon his supposed legal rights, with the barren result of three years' unprofitable litigation, I think your Lordships ought now to dispose of the case as it stands.

This action, although in the form of a petition for interdict,

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS. Lord Watson.

was obviously brought for the purpose of obtaining the judgment of a court of law upon the relative rights of the parties as they existed at the date of the petition, and still exist. And, although the conclusions for interdict are so framed that they might be made to square with that view of their relative rights which I have ventured to suggest, I have come to the conclusion that the more expedient course for your Lordships to follow is to make a declaration in regard to the right, or want of right, of the respondent in such terms as will not exclude him from the benefit of any order or regulation which may hereafter be made by the Railway Commissioners. I am satisfied of the competency of taking that course; and I see no reason to apprehend that the respondent will proceed to act in excess of his rights as defined by the House.

LORD DAVEY. My Lords, the judgment I am about to read is that of my noble and learned friend Lord Macnaghten, who is engaged at the present time at the Judicial Committee of the Privy Council, and has requested me to read his opinion.

LORD MACNAGHTEN. My Lords, the real question at issue upon this appeal is a very simple one, though it has been complicated to some extent by the terms in which the pursuers have framed their prayer for relief, and by the mass of irrelevant matter with which both parties have incumbered the case.

The appellants are a committee nominated by three railway companies, whose lines meet at the general station in Perth. They are incorporated by the Perth General Station Act, 1865. The Act vests the station in them for the benefit of their constituents. The respondent is the lessee and manager of an hotel in Perth known as the Royal British Hotel. On behalf of himself and his servants he claims to be entitled, as of right, to enter the station for the purpose of accompanying hotel visitors to the railway, and also for the purpose of meeting railway passengers who propose to stop at his hotel.

The appellants apparently do not object to the respondent and his servants escorting hotel visitors to the train, nor do they object to the respondent and his servants meeting railway

passengers on their arrival, provided the uniform of the hotel is not worn. Reasonably or unreasonably they object to that, and particularly to a cap which is said to display the name and badge of the hotel in a very conspicuous manner.

It is obvious that, if the appellants have the right of excluding from their station all persons except those who use or are desirous of using the railway, they may impose on the rest of the public any terms they think proper as the condition of admittance. On the other hand, they can have no power to regulate the dress of persons whom they cannot exclude.

The question, therefore, seems to be this: Is the respondent, when not using or desirous of using the railway, entitled as of right, by himself or his servants, to enter the station? Or, to put the question in simpler form, Are the appellants entitled to exclude all persons other than those who use or are desirous of using the railway?

The learned judges of the Second Division of the Court of Session have held that the appellants are not entitled to an interdict against the respondent.

Their Lordships find in fact (1.) that the defender did not enter the station except for the purpose of accompanying passengers who were leaving his hotel or of meeting passengers who had intimated that they were to arrive at his hotel; and (2.) that neither the defender nor his servants ever caused any obstruction or inconvenience at the station. Their Lordships all agree in thinking that the broad question, which seems to me to be the only possible question in the case, was not properly raised; but, with the exception of Lord Trayner, they all express an opinion adverse to the right claimed by the appellants. The Lord Justice Clerk says: "This is a somewhat novel case. Indeed," he adds, "none of the cases which were referred to in the course of the argument come near to it at all." He holds that a servant of an hotel going with passengers or going to meet passengers is "going on what is plainly, in itself, perfectly lawful business." So he is, I should say; but it may be that he is going too far when he forces his way into a place which he is forbidden by a competent authority to enter. He says it would be "a very extraordinary thing" if an interdict should

H. L. (Sc.)
1897
PERTH GENERAL STATION COMMITTEE v. ROSS.
Lord Macnaghten.

be granted against the respondent "from unlawfully entering or trespassing upon any of the railways, stations, and other works or premises of the pursuers." Why so, I would ask, if the respondent insists on making an entry which is unlawful? "The station," adds his Lordship, "is a place which he has a right to enter into, and in the course of business may require to enter." Well, that is just the question. If the station is open, can he enter it at all times and under all circumstances, or only when he is travelling or about to travel by the railway, or can he, as the Court seems to think, give himself the right to enter by attaching himself with or without a special invitation to persons who have the right of entry? It can hardly be enough that in the course of business, that is, for his own profit, he may require to enter. Lord Young says that the general proposition advanced on behalf of the appellants is "not maintainable." Lord Moncreiff calls it "a startling proposition," which, as at present advised, he is, he says, not prepared to affirm.

My Lords, I have the misfortune to differ from the learned judges of the Second Division on almost every point. I venture to think, with deference, that their findings in fact are not relevant. On the other hand, it seems to me that the general proposition which was advanced on behalf of the appellants, and which was put forward plainly enough in argument, whatever may be said about the pleadings, is well founded in law. I think, too, that that general proposition is sufficiently raised by the claim to interdict the defender from unlawfully entering or trespassing on the station, because I agree with the Court of Queen's Bench (*Foulger* v. *Steadman* (1)), in their view that if a man not using or being desirous of using the railway enters upon the railway premises after being forbidden to do so, or stays on the railway premises after being requested to leave, he commits a wilful trespass within the Railway Regulation Act, 1840, and not the less so because he claims some right which cannot exist at law.

Nor can I agree with the Lord Justice Clerk that the case is a novel one. It seems to me that the question of law

(1) (1872) L. R. 8 Q. B. 65.

was decided, and decided rightly, forty years ago by the Court of Common Pleas in the case of *Barker* v. *Midland Ry. Co.* (1), to which, unfortunately, the attention of the learned judges of the Second Division was not directed. In that case an omnibus proprietor claimed the right to enter a railway station with his omnibus bringing passengers and goods for conveyance by the railway or going to fetch railway passengers. The first count related to passengers; the second to goods. The third count stated that "on divers occasions the plaintiff was desirous of bringing his omnibus into the station for the purpose of taking away on each of such occasions a person who, expecting to be carried and deposited as a passenger by the defendants to and at the said station, had directed the plaintiff to meet such expected passenger with the said omnibus at the said station for the purpose of taking such passenger from the said station." Each of the first three counts alleged a malicious refusal on the part of the railway company to allow the plaintiff to enter. The fourth count alleged that the refusal of the railway company to allow the plaintiff to enter their station was a breach of their obligation under the Act 17 & 18 Vict. c. 31, to afford all reasonable facilities for receiving and delivering traffic. The defendants pleaded that the station was their private property, and demurred to the first three counts on the ground that they did not shew any right on the part of the plaintiff to enter the station, nor, consequently, any wrong by them in preventing him from entering. They demurred to the fourth count on the ground that it did not disclose any cause of action, and was founded on a misapprehension of the statute for facilitating traffic arrangements.

The Court gave judgment unanimously against the plaintiff. "The declaration," said Jervis C.J., "proceeds upon the assumption that the station is the private property of the railway company, subject to the rights of the public using the railway. It is not contended that the plaintiff was using or seeking to use the railway. What right, then, can he have to say to the company, 'I will use your private property for my

(1) 18 C. B. 46.

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS. Lord Macnaghten.

profit'? There is no pretence for the action. It has neither principle nor any colour of authority to sustain it. Nor does the 17 & 18 Vict. c. 31, give any such remedy as will support the fourth count." Cresswell J. observed: "The plaintiff had no intention to use the railway, and therefore he has experienced no obstruction which gives him any right of action. He merely desired that other persons should use the railway." "It is said," added Willes J., "that it is the duty of a carrier to allow persons who bring passengers or goods to be carried, to enter his premises for the purpose of delivering there the passengers or the goods. It would certainly be somewhat extraordinary if any such right could exist in one to whom the company owes no direct duty, but who merely brings to the station the individual with whom the company contracts."

My Lords, I think the reasoning of the Court of Common Pleas is unanswerable, and I cannot think the learned judges of the Second Division would have dissented from it if it had been brought to their notice.

It was made a matter of complaint that the appellants did not avail themselves of the summary mode of proceeding given them by the Railway Regulation Act, 1840. But it must be remembered that the respondent had ample warning, and that he insisted on entering the appellants' station as a matter of right. Having regard to the view that has been taken of this case by the different Courts in Scotland before whom the matter has been brought, I think it by no means unlikely that the magistrates would have refused to convict the respondent of wilfully trespassing upon the railway, and I may observe that, although according to the decision of the Court of Queen's Bench in 1872, to which I have already referred, the respondent was a wilful trespasser within the meaning of the Railway Regulation Act, 1840, there is an earlier decision (*Jones* v. *Taylor* (1)) of the same Court, when presided over by Lord Campbell, in which it was held that the justices were not bound to find a person who came on the land of a railway company under the belief that he was entitled to do so a wilful trespasser.

(1) (1858) 1 E. & E. 20.

If your Lordships maintain the rights asserted by the appellants, I do not think there is any reason to apprehend that the decision will be followed by any of those painful separations between members of the same family which Lord Young seems to contemplate as possible. Railway companies are not insensible to public opinion or indifferent to motives of self-interest. They are more likely, I think, to be too lax than too rigorous in the exclusion of the public from their stations. Everyone knows that there have been occasions when railway stations have been used for purposes somewhat foreign to the accommodation of travellers.

As the respondent does not claim any special or peculiar right to enter upon the appellants' property, but rests his case on the supposed rights of the public, I do not think it is necessary that he should be placed under an interdict. It will probably be sufficient that a declaration should be made in general terms. It seems to me that it would be enough to make a declaration as proposed, to the effect in substance that the appellants are entitled to exclude from their premises all persons other than those who use or are desirous of using one or other of the railways served by their station. I think the appeal should be allowed.

LORD DAVEY. My Lords, I will only add on my own behalf that I so entirely agree in the judgment of my noble and learned friend, Lord Macnaghten, which I have just read, that I have not thought it necessary to prepare a judgment of my own.

LORD MORRIS. My Lords, I am unable to concur in the judgment which has been moved by the Lord Chancellor.

The action in this case is an action upon a petition for interdict. The subject-matter on which the interdict is sought appears in the prayer of that petition. It is that the defender, Alexander Ross, "himself or by his 'boots,'" should be restrained "from unlawfully entering or trespassing upon any of the railways, stations, or other works or premises of the pursuers." Stopping there, it appears to me that that is entirely too vague standing by itself. I apprehend it would be necessary in a

H. L. (Sc.) 1897 PERTH GENERAL STATION COMMITTEE v. ROSS. Lord Morris.

petition for interdict to state the circumstances and the specific terms on which the person who is to be interdicted is to be prevented from doing that which he seeks. This is merely a general statement that the defender in the action should not unlawfully trespass upon the station and premises of the pursuers. The mere use of the word "unlawfully" cannot give to it any particular validity. If it were private property absolutely, the entry upon it without the assent of the owner would be unlawful, but in this case it was conceded and admitted in argument on behalf of the appellants that a passenger had a perfect right to go upon the station if he intended to use the railway. Therefore in its generality this statement cannot, in my opinion, be sustained.

And that appears to have been the idea of the pleader, because, having stated it in these general terms, he points out and particularises the matters on which the defender should be interdicted. No. 1 is, "from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the defender Alexander Ross." The second is, "and from waiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel." The answer to the latter of those particular subjects for interdict is that the facts have been found against the appellants. It has been decided as a matter of fact that Alexander Ross or his "boots" were not there for the purpose of obtaining customers, or, as it is familiarly called, touting for customers, but were there for the purpose of meeting customers who had given an intimation that they were coming. Therefore that ground cannot be sustained, as a matter of fact it being found against the appellants.

Therefore, my Lords, the whole petition subsides into that portion of it which deals with the defender, or his servants, entering the station wearing a particular badge. Now, if he had a right to enter the station he had a right to enter it wearing any sort of badge or costume he wished. I do not feel inclined to follow this subject deeper, because it has been fully and adequately dealt with by Lord Trayner in the Court of Session, and I entirely adopt his reasoning. I am, there-

fore, of opinion that this petition for an interdict could not be sustained.

But, my Lords, it has not been dealt with in your Lordships' House upon the prayer of the petition. It has now been decided, or is about to be decided, that the appellants are not entitled to a grant of their petition of interdict, which, as I understand, would make the respondent amenable to contempt of Court if he violated it; but a declaration is to be made of the rights between the parties. I am of opinion that that should be done, if at all, in a suit instituted by the appellants for that purpose, and that it should not be given as a relief upon a petition of interdict which, as I understand, is an entirely different species of suit followed by entirely different consequences. There would have been nothing to prevent the appellants, if the order of the Court of Session was affirmed, in this case from instituting upon the grounds I have stated a suit for a declaration of right. What the course that would have been taken in that case by the present respondent would have been I cannot say. It is possible he might resist it—it is probable he would resist it. I do not know; but that is not the case which he came to meet. The case he came to meet was decided in his favour by the sheriff-substitute of Perthshire, by the Sheriff's Court, and by the unanimous judgment of the Court of Session. In this case, however, the respondent is made to pay the costs of the entire suit in a matter in which there has been, as it appears to my mind, a change of front to a certain extent, inasmuch as the petition of interdict is not persevered in, but a declaration of right is substituted for it.

Upon these grounds, my Lords, I am of opinion that the order of the Court of Session should be affirmed.

Ordered and adjudged, that the interlocutor dated June 26, 1896, *of the Lords of Session in Scotland, of the Second Division, complained of in the said Appeal, be, and the same is hereby, reversed, except in so far as it recalls the interlocutors of the Sheriff-Substitute and of the Sheriff of Perthshire, dated respectively February* 13 *and April* 17, 1896: *And it is*

H. L. (Sc.)
1897
PERTH GENERAL STATION COMMITTEE
v.
ROSS.

declared, that, subject to the terms of any order or regulation which may be hereafter made by the Railway Commissioners, the respondent, Alexander Ross, as tenant of the Royal British Hotel, Leonard Street, Perth, has no right, by himself or his servants, to enter upon or use the Perth General Railway Station, except with the leave of the appellants, and under such conditions as they may prescribe: Further declared, that, in respect of the preceding declaration, it is unnecessary to dispose of the conclusions of the present action for interdict: Further Ordered, that the cause be, and the same is hereby, remitted back to the Second Division of the Court of Session, with directions to find in terms of the above declarations, and to dismiss the appellants' petition, and to find the defender, Alexander Ross, respondent here, liable to the pursuers, the appellants here, in the expenses of process incurred by them both in the Court of Session and in the Sheriff Court: Further Ordered, that the said respondent do repay, or cause to be repaid, to the said appellants the expenses paid by them to the said respondent under the said interlocutor of the Lords of Session in Scotland, of the Second Division: And it is further Ordered, that the said respondent do pay, or cause to be paid, to the said appellants the costs incurred by them in respect of the said appeal to this House.

Lords' Journals, July 27, 1897.

Agents for appellants: *Loch & Co., for H. B. Neave, Glasgow, and James Watson, S.S.C., Edinburgh.*

Agents for respondent: *Stibbard, Gibson, & Wills, for John Hay, Edinburgh.*

[PRIVY COUNCIL.]

LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY . . . . . } DEFENDANTS;

AND

JEAN FLEMING . . . . . PLAINTIFF.

J. C.*
1897
July 27;
Aug. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Policies of Life Assurance—Proviso for Cash Payment of Premium—Onus probandi—Duties of Insurers' Agent—Payment of Premium by Notes Discounted and then Dishonoured.

Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the onus is on the policy-holder to prove cash payment of the premium.

Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds.

And where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder.

Acey v. *Fernie*, (1840) 7 M. & W. 151, approved.

APPEAL from a decree of the Court of Appeal (June 30, 1896) affirming a decree of Meredith C.J.

The facts are stated in the judgment of their Lordships.

The appellants claimed that the notes given to White were in the same position as notes given directly to the appellants, and resisted payment of the policies upon the ground of these notes not having been paid. The respondent contended that the notes were not given to the appellants, but were given to White in pursuance of an arrangement that White should discount such notes, and out of the proceeds pay the appellants the portion of the premium coming to them.

Meredith C.J. held that the Condition No. 10 on the policies

* *Present:* LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and SIR HENRY STRONG.

J. C.
1897
LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY v. FLEMING.

only applied to notes made by the insured and given to the appellants; that the appellants, believing that White had received payment of the premiums, took his note in settlement of the portion of premiums coming to them; that a company would have power to take in payment of premiums notes of a third party, and that default in payment of such notes would not be a default within the terms of Condition No. 10.

In the Court of Appeal the judges were equally divided, with the result that the judgment of Meredith C.J. was affirmed.

Hagarty C.J. and Burton J.A. based their judgments in favour of allowing the appeal upon the finding that the notes taken by White were notes made by the insured, and they treated these notes as being in the same position as if they had been made direct to the company upon the company's forms, and that on non-payment of these notes the assured was wholly in default.

Maclennan and Osler JJ.A., on the other hand, held that the notes in question had been given to White for the purpose of his discounting them and paying the premiums out of the proceeds of the discount; that White had discounted the first note and received the proceeds thereof on November 27, 1894, and had discounted the second note and received the proceeds thereof on December 22, 1894; and that thereupon such proceeds became on their receipt by White moneys of the appellants in such a manner that the premiums were actually paid in cash to the appellants.

Robinson, Q.C., and *Tyrrell T. Paine*, for the appellants, contended that there was no evidence whatever of any agreement between the insured and White to the effect stated in the last cited judgments, and that the view relied upon therein was contrary to the tenor of the documentary evidence in the case. The effect of the conditions indorsed on the policies was that cash payment of the premiums was necessary to their validity. Such cash payment was not effected by giving notes until the notes were paid, and the notes in question never were paid. The notes were not discounted for the purpose of paying the premiums, and the proceeds of the discount were not moneys

of the appellants in the hands of White. Nor did the giving by White of his note to the insurers and its receipt by the latter amount to a transaction by which the appellants accepted White's note in payment of the premiums. The receipt of the note was an indulgence to White as between principal and agent, and the insured had nothing to do with the transactions of the insurers and their agents inter se. His duty under the contracts was if he gave notes to pay them in cash when due, and this duty he had not discharged. Reference was made to *Xenos* v. *Wickham*. (1)

M'Carthy, Q.C., for the respondent, contended that the transaction between the assured and White amounted to a payment in cash to White as the appellants' agent of the insurance premiums. White discounted the notes, and thereby was placed by the assured in possession of funds sufficient to pay the premiums so far as was required. Then the appellants accepted from White his promissory note, and accepted him as their debtor in the place of the assured. They cannot after such acceptance claim to cancel the policies by reason of default of payment by White of the note made by White to the appellants. Reference was made to *Montreal Assurance Co.* v. *McGillivray*. (2)

Robinson, Q.C., replied.

The judgment of their Lordships was delivered by

SIR HENRY STRONG. This is an appeal from a judgment of the Court of Appeal of the province of Ontario, affirming a judgment of the learned Chief Justice of the Common Pleas Division. The action was brought by the respondent as assignee of two policies of assurance for the sum of $5000 each, effected by one James Fleming upon his own life and by him assigned to the respondent. The policies, which were identical in form, contained a proviso that they were subject to the conditions thereon indorsed. Among these conditions were two containing the following provisions: "(1.) Policies shall not be in force until the first premium be paid." "(10.) If a note or other obligation be taken for the first or renewal premium or any part

(1) (1867) L. R. 2 H. L. 296, 319. (2) (1859) 13 Moo. P. C. 87, 120.

J. C. 1897 — LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY v. FLEMING.

thereof and such note or obligation be not paid when due the policy or assurance becomes null and void at and from default."

Various defences were set up by the appellants, but only those founded on the 1st and 10th conditions are now material, the others having been abandoned in the Courts below.

The questions to be considered are therefore: (1.) Were the policies ever in force? (2.) If so, did they subsequently become void?

The policies, which bear date December 4, 1894, were effected through the agency of one W. H. White, who acted as the general agent at Toronto of the appellants, an English life assurance company carrying on business in Canada, and having the head office of its Canadian branch in Montreal.

The action was tried before the learned Chief Justice without a jury, when the following facts appeared in evidence.

On or about November 19, 1894, James Fleming, the assured, delivered to White for transmission to the appellants' head office at Montreal a written application for a policy on his own life for $5000 at a premium of $105.80. This application contained an agreement that no contract of insurance should take effect until the first premium should have been paid. At the same time Fleming handed to White his own promissory note of that date for $105.80 payable six months after date to White's order, at the office of Bush & Graham, White's own bankers. This note was not in accordance with a form furnished to White by the appellants, nor was it submitted to the appellants for their approval.

For this note White handed to Fleming a receipt in the following words:—

"No. 4400. (In duplicate). Note payable 6 months.

"London and Lancashire Life Assurance Company.

"Agent's Interim Receipt.

"Received from James Fleming, Esq., of Wyevale, his promissory note for one hundred and five $\frac{80}{100}$ dollars (on which the sum of . . . . . dollars has been credited) being for the first premium for an assurance of $5000 on the life of himself, provided the application be accepted by the company, and if accepted I agree to deliver the official acceptance receipt from

the head office of the company in Montreal; or should the said application be declined, I undertake to return to James Fleming, within 15 days. "W. H. W." Esq., or to his order, the said promissory note ~~It is hereby understood and agreed that if the note be not paid at maturity the policy or official receipt shall be null and void, but nevertheless the note shall be paid in full.~~

"(Sgd.) W. H. White,
"Dist. Mangr.

"Date, 19/11/94.
"Place—Toronto."

This receipt was in the form supplied by the appellants except that the concluding sentence in the printed form was ruled out and the words "within 15 days" and the initials "W. H. W." were interlined.

On November 27, 1894, White forwarded the application to the head office, and its receipt was acknowledged by the manager on the following day.

At some date which is not clear upon the evidence, but which must have been between November 28 and December 4, 1894, James Fleming's application was altered from an application for a single policy for $5000 to one for two policies of $5000 each, which application as altered was accepted by the appellants. This is shewn by the two official "interim acceptance receipts" which were forwarded by the appellants to White for delivery to James Fleming in a letter of December 5, 1894, in which letter they gave White notice that they had debited his account with the amount of the two premiums. No evidence was given shewing when these receipts were handed to James Fleming, but they were produced at the trial with the countersignature of White which was essential to their validity.

Up to this time nothing had been received in respect of the premium on the second proposed assurance for $5000.

White however subsequently, on December 10, 1894, received in respect of it a note of Robert Fleming for the sum of $\$105\frac{80}{100}$, the exact amount of the premium. This note was made payable to W. H. White or order three months after date at the bank of Bush & Graham. This note, like the former, was not

J. C.
1897
LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY v. FLEMING.

in the form furnished by the appellants, nor was it submitted to the appellants for their approval. It does not appear that any receipt was given expressly for this note, probably for the reason that the interim receipts from the head office then in White's hands were upon signing of this note handed over to James Fleming.

These notes were not forwarded by White to the head office, but were retained by him and dealt with as follows. Robert Fleming's note, as it appears from a memorandum indorsed upon it, was discounted by White with Bush & Graham on December 22, 1894, and the proceeds were applied to his own use. It was not paid at its maturity, but was taken up by a renewal note at two months on March 21, 1895. When this renewal note became due it was also dishonoured.

James Fleming's note, which did not mature until May 22, 1895, was discounted by White with the same bankers on March 27, and the proceeds in like manner applied to his own use. This note was also dishonoured at maturity. On June 5 Robert Fleming brought to White a renewal with which he wished to retire James Fleming's overdue note, but this the bankers refused to accept. White indorsed all the notes, and appended at the foot of each his personal guarantee and waiving protest. No evidence whatever was given of what took place at the time the notes were handed to White. The receipt for the first note specifically attributes it to the premium, and in the case of Robert Fleming's note there was no proof to warrant the assumption that it was given for any other purpose than to White as the appellants' agent in payment of the premium, with the amount of which it exactly coincides. According to the ordinary course of business between White and the appellants cash premiums were remitted, and notes taken for premiums were forwarded by the agent to the appellants at their periodical settlements at the close of each month. Under his agreement with the appellants the agent was entitled to retain 55 per cent. of first year's premiums paid in cash.

On December 31, 1894, White wrote the appellants' manager as follows :—

"I omitted to inclose settlement of new premiums. Hence

I wired you to-day as follows: 'Mailed my note $135.16 for premiums Fleming, McGlade, Thompson, which I inclose herein'"; and on January 3, 1895, the appellants' manager acknowledged the receipt of the letter and note as follows: "I am in receipt of your letter of the 31st ult. inclosing note at three months for $135.16, which we will hold as requested."

James Fleming died of consumption on June 15, and the appellants first heard of his death on June 17 or 18, 1895.

On May 31, 1895, the appellants, who had no notice that at that time James Fleming was ill, cancelled the policies in their books, and about this time difficulties having arisen between them and White, they sent their inspector to Toronto to endeavour to effect a settlement with him. On the same date (May 31) the appellants credited White with the amount of the premiums on the two policies which had previously been charged to him. They subsequently, on the assignments to the present respondent being sent to their office for registration, refused to register them, assigning for a reason that the policies were not in force.

The notes which had remained overdue in the hands of Bush & Graham, the bankers, were paid and taken up by the appellants, and upon a settlement with White they handed back to him his own note of December 31, 1894.

It was established in evidence that at the date of the receipt of White's note at the end of December the appellants had no knowledge whatever of the transactions which had taken place between White and the Flemings. White in his evidence states positively that his note of December 31 was not given in payment or discharge of the premiums, but rather to serve as evidence that they were due. His words are: "Where I had given time on premiums and the cash had not been paid to me, and I had not the cash to pay myself, I gave a note myself as evidence there was something due them—not as payment of the premium."

The learned Chief Justice upon the evidence of these facts held that the appellants had accepted White's note in satisfaction and discharge of the premiums payable by the assured under the terms of the policies and conditions, and that the

J. C.
1897
LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY v. FLEMING.

defence therefore failed, and he gave judgment accordingly for the respondent. The Chief Justice also adopted the further point, taken by the respondent, in answer to the defence based on the 10th condition, that the character of the transaction between the Flemings and White was not that the notes were given directly for the premiums, but that they were given to White, not as agent for the appellants, but in order that he might raise money for the accommodation of James Fleming, which money he was to apply in payment of the premiums, and that the proceeds of the discounts thus became funds belonging to James Fleming in White's hands which he must be assumed to have applied in discharge of Fleming's liability for the premiums.

In the Court of Appeal the Chief Justice and Burton J. were of opinion that the respondent was not entitled to recover, and that the action ought to be dismissed, but Maclennan J., with whom Osler J. agreed, being of a contrary opinion, the Court were equally divided and the judgment was upheld.

Maclennan J. based his judgment on the point last noticed, namely, that the premiums must be taken to have been paid in cash by the application of the proceeds of the discounted notes, though he also stated his concurrence in the other ground that the premiums were satisfied by the acceptance of White's note.

It was urged with much force by Mr. Robinson, in his argument at their Lordships' bar, that the appellants were entitled to succeed upon the defence founded upon the first condition, in that there had never been any payment of premiums either in cash or by notes for the reason that White had not conformed to the authority conferred upon him by the appellants, and that his acceptance of the notes was consequently ultra vires. Their Lordships do not think it necessary to express any opinion on this point; for, conceding that the notes were accepted by White in payment of the premiums, as their Lordships are clearly of opinion they were, the 10th condition applied upon their non-payment when due, and the policies thereupon became void. That the notes were placed in the hands of White as an agent for James Fleming, in order that he might raise money by negotiating them and out of such money pay the premiums, is

an assumption which, in the entire absence of evidence of any agreement to that effect, their Lordships cannot make. If that was the arrangement, it was a matter to be proved by the respondent.

As regards the first note, that given by James Fleming on November 19, there is not only no such proof, but the receipt is in express terms a receipt for the note as given on account of the premium; it is written on the company's forms, and is signed by White as district manager. In the case of the later note, that of Robert Fleming given on December 10, there is, it is true, no receipt, but we are not to presume that the transaction was in any way different from the first; if there was any arrangement such as the judgment below proceeds upon, it must have been made by, or at least known to, Robert Fleming, but he is not called as a witness. Then, as regards both notes, White repudiates such an agreement as that suggested, and the circumstance that the notes were for the exact amount of the premiums, thus leaving no margin for the amount to be deducted for interest or discount, is an indication that the fact was that the notes were given for the premiums in accordance with the terms of the receipt produced. It was not, however, for the appellants to shew that there was no arrangement: no presumption which they were called upon to displace was warranted by the facts proved; the onus of proof was upon the respondent to shew that the premiums were paid in cash, and their Lordships are of opinion that in this she has entirely failed. Upon this part of the case Burton J.'s view, as expressed in the following passage in his judgment, commends itself to their Lordships' consideration as a correct conclusion from the evidence. The learned judge says:—

"It is said that the fact of the notes being made payable personally to the agent and made payable at a bank is some evidence of an agreement between the applicant and the agent to discount them for him and apply the money on his premium. To my mind it affords no such evidence even if it stood alone, but White gives no such version. Robert Fleming is not called, and it is directly in variance with the receipt produced, which shews it was not given for the purpose of being discounted and

J. C. 1897 LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY v. FLEMING.

paying the premium from the proceeds, but that it was given and accepted as the first premium. It affords, I think, very cogent evidence that the agent contemplated from the first making an improper use of the notes and negotiating them for his own purposes, but not the most remote evidence of an agreement between the applicant and the agent to raise money for him to pay the premium."

Upon the other propositions relied on in support of the judgment under appeal, their Lordships have even less hesitation than on the first branch of the case in expressing an opinion in favour of the appellants. There are many answers to what has been urged on this head. It will suffice, however, to refer to two. In the first place, how, without an entire disregard of legal principle, could it possibly be held that the appellants must be deemed to have intended to enter into entirely new contracts of assurance of the life of James Fleming, and to have accepted their own agent's note in payment of the premium, when they were in entire ignorance of all that had passed between White and Fleming, and were entirely unaware of the relations in which they stood to the assured? This, like the other point relied upon, was clearly a matter to be proved by the respondent; and it is a sufficient answer to say that there is not only not a shadow of proof in its support, but strong evidence the other way. Further, the principle upon which the decision on the case of *Acey* v. *Fernie* (1) proceeded applies. The dealings between the appellants and their agent were as regards the assured res inter alios, and afford no presumption of an intention to treat the agent as acting, not for his true principles, but as the representative of the assured.

Their Lordships are of opinion that the judgment cannot be supported; and they will humbly advise Her Majesty to allow the appeal, of which the respondent must pay the costs.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitor for respondent: *S. V. Blake*

(1) 7 M. & W. 151.

[PRIVY COUNCIL.]

KINGSTON RACE STAND, LIMITED . DEFENDANTS; J. C.*
1897
AND
MAYOR AND COUNCIL OF KINGSTON PLAINTIFFS. *May* 25, 27; *Aug.* 3.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Practice—Misdirection—Withdrawal of Facts from Jury—Setting aside Verdict.

Where, in an action of ejectment, the plaintiffs' title is admitted, it is misdirection to withdraw the facts from the jury (who could not agree) and direct a verdict for the defendants on the ground that the plaintiffs had not proved possession during any part of the statutory period. Evidence having been submitted which, if believed, proved their possession of part of the lands sued for, a new trial was rightly ordered.

APPEAL from an order of the Supreme Court (May 22, 1896), setting aside a judgment in favour of the appellants and directing a new trial.

The facts are stated in the judgment of their Lordships.

In the pleadings both parties alleged as follows :—

The municipal board of the city and parish of Kingston, who were in the occupation of the Kingston Racecourse, with the assent of the churchwardens of the parish of Kingston, at the request of the appellant company made to the said municipal board, permitted the company to enter upon and to make a paddock, and to erect an iron stand on the land sought to be recovered in the action, which formed part of the Kingston Racecourse.

By virtue of such permission the company entered upon the said land and made or inclosed a paddock, and erected an iron stand thereon, and from time to time occupied the same for the purposes of horse-racing.

The appellants pleaded that they were in possession by

* *Present:* LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. WAY.

J. C. 1897

KINGSTON RACE STAND v. MAYOR AND COUNCIL OF KINGSTON.

themselves of the land in question, and counter-claimed that they had a charge on the land in question for their expenditure.

It appeared at the trial that the stand was partly erected on a public road, which crossed the racecourse, and had been diverted apparently without any legal authority. The actual defence made depended upon the Statutes of Limitation, namely, Laws 12 of 1881 and 7 of 1888. The jury were unable to agree, and could find no verdict. Northcote J. then directed the jury that the respondents had not proved possession by themselves for twelve years before action brought, and consequently their verdict should be for the defendants on the claim, and the jury obeyed the judge's order.

The Court ordered a new trial.

The Chief Justice concurred therein on the ground that the direction of Northcote J. was erroneous, and that there was a question for the jury upon the facts of the case, namely, "the position of the land, the correspondence, the resolutions of the board, the expenditure and occupation of the defendants, and generally the acts and conduct of the authorized agents of the parties, and that such question was, Did the municipal board intend to give up possession, or was the defendants' occupation merely part of a joint arrangement, by which the board, while retaining their right of possession, gave permission to the defendants to use and occupy the land for certain purposes in which they and the defendants had a common interest? In the former event the statute had operated, but not in the latter. As the decision upon the facts was withdrawn from the jury by the final direction of the learned judge, I think there should be a new trial."

Northcote J. concurred on the ground that "the question whether the defendants were tenants at will or merely licensees is one which the plaintiffs are entitled to raise and to have submitted to a jury if they desire it."

Asquith, Q.C., *Sir H. H. Hocking*, and *Loehnis*, for the appellants, contended that the Supreme Court should not have ordered a new trial when, on the facts as presented at the trial, there was no evidence to submit to the jury which would have

justified them in finding a verdict for the respondents. It was contended that the respondents had given no evidence to prove their title to the land in question, or to establish any act of dominion exercised by them, or any interference with the appellants' possession, until they formally demanded possession on December 29, 1894. Nor was there any evidence that the appellants ever held possession of the stand, inclosures, and paddocks by permission of the respondents, or at any rate after June 1, 1882. Nor was there any evidence of the appellants being merely licensees. A new trial ought not to be ordered to enable the respondents to set up a new case or raise points not taken at the trial, or until the motion for a new trial. Reference was made to the following cases which were cited in the judgments of the Supreme Court: *Bobbett* v. *South Eastern Ry. Co.* (1); *Mayor of Brighton* v. *Guardians of Brighton* (2); *Day* v. *Day.* (3)

Sir E. Clarke, Q.C., and *Danckwerts*, for the respondents, contended that the order for a new trial was justified on the ground of there having been misdirection, in directing a verdict for the appellants after the jury had disagreed upon the facts. The right direction would have been that the Statutes of Limitation applied, not to want of actual possession by the plaintiff, but to cases where the plaintiff has been out of, and the defendant in, actual possession for the prescribed time; that there must be both absence of possession by the person entitled and actual possession by an intruder without right for the prescribed time to bring the case within the statutes. Then there was evidence on which the jury might reasonably find that the plaintiffs were not excluded from possession by the defendants, but that, on the contrary, they were in possession, and that the defendants had not been in sole and uncontrolled possession. Reference was made to the cases cited above.

[LORD MACNAGHTEN referred to *President, &c., of Magdalen Hospital* v. *Knotts.* (4)]

(1) (1882) 9 Q. B. D. 424.
(2) (1880) 5 C. P. D. 368.
(3) (1871) L. R. 3 P. C. 751.
(4) (1879) 4 App. Cas. 324.

J. C.
1897
KINGSTON RACE STAND v. MAYOR AND COUNCIL OF KINGSTON.

See further, *Agency Co.* v. *Short* (1); *Reilly* v. *Thompson* (2); *Tottenham* v. *Byrne* (3); *Leigh* v. *Jack*.' (4)

Asquith, Q.C., replied.

1897. Aug. 3. The judgment of their Lordships was delivered by

MR. WAY. This is an appeal from an order of the Supreme Court of Jamaica setting aside a judgment for the defendants, and directing a new trial in an action for the recovery of land, in which the appellants were defendants and the respondents plaintiffs. The land sought to be recovered was portion of the Kingston Racecourse—part of it being the site upon which the stand is erected, and the rest some small paddocks or inclosures adjoining.

The plaintiffs alleged in their statement of claim that the racecourse was acquired by the corporation of Kingston under the authority of an Act of the local legislature (49 Geo. 3, c. 28), and that it was dedicated to the use of the public by that statute, which contains an express provision to the effect that it was "to be at all times open from 5 A.M. until 8 P.M. for the use and recreation of the public." It was further alleged that under or by virtue of Law VIII. of 1866 the racecourse was vested in the churchwardens of the parish of Kingston, who allowed the municipal board of the city and parish of Kingston to manage it, and that ultimately it was transferred to and vested in the plaintiffs under Law XVI. of 1885. The defendants pleaded possession. The plaintiffs, for some reason or other, offered no evidence in support of their allegations, although it appears incidentally, from documents admitted in the course of the trial, that they must have been well founded. The consequence was, that it was not open to the Courts below or to this Board, as the learned counsel for the respondents admitted, to entertain questions which would have been worthy of serious consideration if they had not been excluded by the manner in which the case was conducted—such as the question whether it was possible for the defendants or any one else to

(1) (1888) 13 App. Cas. 793, 798.
(2) (1877) 11 Irish Rep. C. L. 238.
(3) (1861) 12 Ir. C. L. Rep. 376.
(4) (1879) 5 Ex. D. 264.

defeat the statutory rights of the public—whether the possession of the defendants, such as it was, did in fact interfere with the enjoyment of any part of the racecourse by the public, and whether the true view of the position of the defendants was not that they were merely licensees. The Chief Justice, indeed, in his judgment on the application for a new trial, expressed an opinion that this last question was open as matters stood. But it is difficult to see how that view can be supported in the absence of evidence shewing that the racecourse was vested in the plaintiffs solely for the purpose of being used and kept for the benefit of the public, for whom the plaintiffs were in fact merely custodians and managers.

However that may be, the plaintiffs came forward at the trial claiming to be owners with the ordinary rights and liabilities of owners, and the case was fought on that footing.

It appeared at the trial that for many years the stands for the races were temporary structures put up before and removed after each meeting; but in May, 1881, a number of gentlemen styled a race committee, whom the appellants represent, applied for and, in June, 1881, obtained from the municipal board "permission to erect a grand stand and suitable inclosures and paddocks immediately adjoining on such site on the Kingston Racecourse as is delineated and described in the plan * * prepared at the instance of such committee by John Parry, Esq., the city surveyor"; and the resolution granting such leave proceeded to order "that Mr. Parry do co-operate with the said committee in such work, at the same time protecting the interests of the board and the general public whom they represent." The appellants had previously (in March) applied to the municipal board for a lease of the land in question for 999 years for racing purposes. This application was refused in August, as the municipal board was advised that, having regard to the Act 49 Geo. 3, c. 28, they had no power to comply with it. A copy of the opinion obtained by the board was sent to the committee.

Subsequently to the permission being given, the race committee erected a grand stand and fenced the paddocks and inclosures which are the subject of this action. Early in 1894

J. C. 1897 KINGSTON RACE STAND v. MAYOR AND COUNCIL OF KINGSTON.

the respondents, having made inquiry into the legality of the permission which had been given by the municipal board to the race committee, applied to the appellants for a rental of 20*l.* per annum, and afterwards for possession of the premises. Being unable to obtain any definite reply from the appellants in the correspondence, which lasted over a year, the respondents brought the present action. The writ was issued on May 21, 1895.

At the trial it was assumed on both sides that the appellants went into possession as tenants at will of the respondents, and, the local statutes of limitation being the same as the English, the principal controversy was whether the appellants had been in possession for thirteen years without payment of rent—that is, for a year after the tenancy at will began, and for the period of limitation afterwards. As to the race stand and the fence by which it was inclosed, it was not denied that both had been put up in 1881 or 1882, and that a caretaker for the appellants had lived upon the premises, to which, except on race-days and other similar occasions, the public had no access. As to the paddocks the case was different. The only evidence of the appellants' possession was their occasional use of the paddocks at races, and that they were fenced in by the appellants. Although several of the witnesses alleged that the paddocks were inclosed when, or shortly after, the stand was erected, others alleged the contrary. Henry Priest, for example, said, "The paddock I know. Up to 1885 that land was not inclosed, nor 1886 either." This clearly was evidence to be submitted to the jury on behalf of the respondents.

The jury having shewn a not unnatural reluctance to find for the respondents, they were recalled after their retirement by the learned judge, who directed them that the respondents had not proved possession by themselves for twelve years before action brought, and consequently their verdict should be for the defendants.

Their Lordships are unable to concur in this direction. There was even upon the aspect of the case which was presented at the trial evidence to be submitted to the jury as to the inclosure of the paddocks, which if believed entitled them to find for

the respondents as to part of the land in dispute, and the jury ought to have been told that as the title of the respondents, under whom the appellants claim, was admitted, it could only be displaced by evidence that the respondents had been out of possession and the appellants in undisputed possession for twelve years after the expiry of the alleged tenancy.

On these grounds their Lordships agree in the conclusion at which the Supreme Court have arrived; and they will humbly advise Her Majesty to dismiss this appeal, of which the appellants will pay the costs.

Solicitors for appellants: *Pennington & Son.*
Solicitors for respondents: *Oliver & Sons.*

[PRIVY COUNCIL.]

KIMBERLEY WATERWORKS COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

DE BEERS CONSOLIDATED MINES, LIMITED . . . . . } PLAINTIFFS.

(TWO APPEALS CONSOLIDATED.)

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Agreement—Construction—Proviso—Monopoly of Supply.

Where respondents had agreed for a specified term to "obtain and purchase all the water required by them for their mining purposes" from the appellants and from no other person or persons, with a proviso excepting any water obtained by them from their own mines:—

Held, that on the true construction of this agreement the proviso was not limited to such mines as the respondents possessed at the date of the agreement; and that on the other hand they could not deprive the appellants of their monopoly of supply by obtaining it gratis elsewhere.

CONSOLIDATED APPEALS from two decrees of the Supreme Court (March 1, 1895) reversing two decrees of the High Court of Griqualand (Dec. 14, 1894).

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. WAY.

J. C.
1897
KIMBERLEY WATERWORKS COMPANY v. DE BEERS CONSOLIDATED MINES.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *Hume Williams*, for the appellants.
Cohen, Q.C., and *G. Lawrence*, for the respondents.

1897. July 31. The judgment of their Lordships was delivered by

LORD MORRIS. These appeals come from two orders of the Supreme Court of the Cape of Good Hope, dated March 1, 1895, whereby the orders of the High Court of Griqualand of December, 1894, were reversed. There were two actions, in the first of which the respondents were plaintiffs and the appellants were defendants. In the second action the position of the parties was reversed. Both actions were tried and dealt with together by the High Court of Griqualand, who gave judgment in both actions in favour of the appellants, while the Supreme Court of the Cape of Good Hope gave judgment in both actions in favour of the respondents, which judgments are the subject of this appeal.

It appears that before 1888 the appellants had by agreement with the Kimberley Town Council the exclusive right of supplying the municipality with water for a period of twenty-five years, to count from the year 1880. In 1888 the respondents, who are the owners of two mining properties—the Kimberley and De Beers—obtained an Act of Parliament by which certain rights and privileges were granted to them for the supply of water to the inhabitants of Beaconsfield and to the mining areas of Kimberley, De Beers, Dutoitspan, Bultfontein, and others. The respondents had also acquired all the concessions and rights of one Thomas Lynch. On November 26, 1888, the appellants and respondents entered into an agreement, the construction of which is the question in these appeals. By clause 1 the appellants, on or before January 1 following, agreed to pay the respondents the sum of 10,000*l.* in cash. Clause 2 of the said agreement was as follows:—

"That the said Kimberley Waterworks Company, Limited, shall from and after the first day of December eighteen hundred and eighty-eight, supply and continue to supply the mining

companies and persons engaged in mining the Kimberley and De Beers mines with water for their mining purposes at the price of eightpence per one hundred gallons and shall also from time to time as any mining companies or mining properties in the Dutoitspan or Bultfontein mines or mines adjacent thereto are acquired by purchase hire or otherwise, or become amalgamated with the De Beers Consolidated Mines, Limited, supply and continue to supply such companies and properties with water for their mining purposes at the price of eightpence per one hundred gallons."

The rates previously charged were 1*s.* 3*d.* per 100 gallons.

Clauses 6 and 7 were as follows:—

"That the said De Beers Consolidated Mines, Limited, shall at all times for and during the whole and full term of this agreement obtain and purchase all the water required by them for their mining purposes from the said Kimberley Waterworks Company, Limited, and from no other person or persons or company or companies whatsoever: provided however, that nothing herein contained shall prevent the said company from using any water obtained by it from the mines or from its wells or reservoirs.

"7. That the said De Beers Consolidated Mines, Limited, shall not at any time during the term of this agreement directly or indirectly establish, promote, or assist in the establishment or promotion of any water or other company, or venture in the district of Kimberley having objects similar to those of the Kimberley Waterworks Company, Limited, but that they shall and will at all times whenever called upon to do so by the said Kimberley Waterworks Company, Limited, use their utmost means and endeavours to oppose any company or venture, or attempted venture or undertaking having for its object or partial object the supply of water to the mines of Kimberley, De Beers, Dutoitspan, Bultfontein, and the neighbourhood."

In December, 1891, the respondents purchased a farm upon which there is a mine called the Premier Mine. Large quantities of underground water accumulate in the said mine. The respondents claimed a right under the proviso of s. 6 of the agreement to use for mining purposes the water made by

J. C. 1897 KIMBERLEY WATERWORKS COMPANY v. DE BEERS CONSOLIDATED MINES.

the Premier Mine. It lies about four miles distant from the De Beers Mine, and is outside the municipality of Kimberley. It has not been argued on behalf of the respondents that the Premier Mine was "adjacent" within the meaning of clause 2 of the agreement. The respondents in March, 1894, brought an action for a declaration of their right to use the water of the Premier Mine for mining purposes in their other mines, and this is the subject of the first action. The subject of the second, or cross, action by the appellants against the respondents was for constructing an artificial drain from the Transvaal Road and conducting large quantities of water for the purpose of using in their mines, Kimberley and De Beers, in breach of the said agreement, and claimed damages by reason of such breach and an injunction. At the time of the agreement of November 26, 1888, the respondents had on their property a reservoir for collecting the surface water thereof called the Kenilworth Dam. Before 1894 the corporation of Kimberley had carried along the west side of the highway, called the Transvaal Road, storm water falling on part of the township. The water was not carried to the respondents' property, whose dam was on the east side of the road, but to a place called the White Dam. In January, 1894, the respondents obtained the permission of the Town Council of Kimberley to construct a dish drain across the Transvaal Road, and thereby bring the water which had accumulated on the property of the town council into the Kenilworth Dam on the property of the respondents. The appellants remonstrated against such permission being given, but prior thereto the town council had given the permission and refused to withdraw it. The respondents thereupon constructed the dish drain, and brought the water which had been the property of the town council into their own land and used it for their mining purposes. In this second, or cross, action the appellants obtained a verdict of 100*l.* for damages, and also an injunction restraining the respondents from thereafter committing the breach complained of. The High Court of Griqualand decided that the using of water from the Premier Mine for mining purposes, which was the subject of the first action, and the using the water obtained

by permission of the Town Council of Kimberley, the subject of the second action, were both breaches of the agreement of November 26, 1888. The Supreme Court of the Cape of Good Hope, on appeal, decided that the respondents had committed no breach of the agreement, and were entitled to use the water, the subject-matter of both actions, as they were doing. They were of opinion that to constitute a breach the respondents must have used water which they had obtained by means of a purchase, or by means of some transaction equivalent to a purchase. Their Lordships are unable to concur in this view. The prohibition contained in paragraph 6 of the agreement compels the respondents to obtain and purchase all the water *required* by them for mining purposes from the appellants and from no other person or persons whatsoever. The Supreme Court do not appear to have sufficiently considered the effect of the word "required" in the paragraph. There is an obligation on the respondents to get their mining water from, and to pay for it to, the appellants, and it can make no difference whether they get mining water so required for nothing or whether they pay for it to any other person. It would be a curious result if the appellants should be deprived of the monopoly they had bargained for because the respondents, although they got the water from another, did not pay for it. The respondents in obtaining water from the town council were acting in contravention of the spirit and of the letter of the agreement entered into by them with the appellants. Their Lordships are consequently of opinion that the appellants are entitled to retain their verdict in the second action. As to the first action, dealing with the use of the water made by the Premier Mine, their Lordships are of opinion that the proviso in paragraph 6 protects the respondents. The Premier Mine and the water made in it are the property of the respondents. Paragraph 2 contemplated the purchase of mines by the respondents, and although the Premier Mine is not adjacent within the meaning of paragraph 2, and the appellants consequently are not bound to supply it, by paragraph 6 the respondents are entitled to obtain all water from the mines, and there is no limitation of "the mines" to the mines in existence at the time of the agreement.

J. C. 1897 KIMBERLEY WATERWORKS COMPANY v. DE BEERS CONSOLIDATED MINES.

Their Lordships are therefore of opinion that the order made on the first action by the Supreme Court of the Cape of Good Hope should be affirmed, and that the order made on the second action should be reversed, and the order of the High Court of Griqualand in that second action should be restored, and their Lordships will so humbly advise Her Majesty, the appellants to have the costs of the second action in the High Court of Griqualand and the Supreme Court of the Cape of Good Hope. The parties shall bear their own costs of the appeals.

Solicitors for appellants: *Renshaw, Kekewich & Smith.*
Solicitors for respondents: *Hollams, Sons, Coward & Hawksley.*

[PRIVY COUNCIL.]

J. C.* 1897 *May* 21, 25; *July* 24.

PEARSE . . . . . PLAINTIFF;

AND

SCHWEDER & CO. . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Verdict—Jurisdiction of Court as to setting it aside.

The law of Natal does not authorize judges to set aside a verdict as if they were a court of appeal upon questions of fact.

Where a jury had found that a binding agreement had been entered into between appellant and respondents, and had given a verdict for damages for its breach:—

Held, that by the law of Natal the verdict could not be set aside unless it were one which the jury could not reasonably find.

APPEAL from an order of the Supreme Court (Sept. 11, 1894), which set aside a verdict and judgment in favour of the appellant for damages and for a declaration that the respondents should indemnify the appellant in respect of purchases made on their behalf, and directed judgment to be entered for the respondents.

* *Present:* LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. WAY.

The facts are stated in the judgment of their Lordships.

Israel Davis, for the appellant.
F. W. Hollams, for the respondents.

1897. July 24. The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The principal question in this case is whether an agreement was come to and conclusively made between the appellant and respondents, whereby the latter agreed to employ the former as their agent in Natal for buying wool and other produce, on the terms contained in a memorandum in writing made on October 21, 1892, by the appellant and Percy Schweder, a member of the respondents' firm. The suit was brought by the appellant against the respondents for breaches of this alleged agreement. The appellant at the time of the transaction was a wool-buyer, and carried on business at Durban, in the Colony of Natal. The respondents are wool-merchants carrying on business in the City of London, and prior to 1893 the appellant had been in the habit of purchasing wool and other produce for them on commission. In March, 1893, Percy Schweder went out to South Africa, and some correspondence and interviews then took place between him and the appellant with a view of altering the business relations which had previously existed between the appellant and the firm. These resulted in making the memorandum in question. The evidence by which the appellant sought to prove that there was a concluded agreement is as follows.

On May 2, 1893, Percy Schweder wrote a letter from Cape Town to the appellant at Durban, which contains the following paragraph: "But for our better understanding it is necessary for me to enlighten you as to my position, viz., that the London firm and myself are one, since I am the responsible partner in charge of the entire South African business, and, therefore, so long as I am in this part of the world, my instructions have to be your guide and none other, and in case of conflict of instruction or doubt your reference has to be to me. Your presumption that you must follow London, as they have better information

J. C. 1897 PEARSE v. SCHWEDER & Co.

than I, probably is quite wrong, and you will please dismiss this from your mind. I am in constant cable communication and correspondence with my people at home, as you may imagine, and even their letters to you (the copies) pass through my hands here before you see the originals. I wish to avoid everything causing misunderstanding, but I beg to remind you of the first message I wrote to you on landing in this country, viz., that henceforth the whole business centres in me, and you must take your instructions from me. If not it will give trouble." The other part of the letter is not material to the present question. On August 5, 1893, he wrote from Cape Town to the appellant at Durban a letter, in which, after saying he had determined not to intrust him with any further credits, "because it is not safe for us to give you the power to draw, seeing that we have no guarantee through your part that your shipments will turn out what they profess," he says: "If you are in a position to place an effective and substantial guarantee to the extent of 2000*l.* at my disposal to be availed of by me or my firm to cover deficiencies arising at any time through your disregard of orders and instructions, short falls of yields or the like, if you are able to get me the guarantee of a bank or thoroughly responsible and substantial guarantor, I shall be willing to approach the subject of employing you in some shape or other again for the execution of our Natal orders."

On August 16, 1893, the appellant wrote to Percy Schweder complaining that for the past few months he had suffered from constant misunderstandings, and saying that if they had met he intended proposing that for the purpose of acquiring a complete control of his Natal agency Percy Schweder should alter the appellant's terms to a salary and commission, and making various suggestions for the conduct of the business. To this letter Percy Schweder replied by one of August 25, 1893, dated Cape Town, in which he says, "I have been considering your letter 16th instant," and after justifying himself in regard to the complaints of the appellant, says: "I could not without consulting with my London partners express myself as to the expediency of entertaining your proposal to take over your business and place you on salary and commission. I am writing

them this mail and will hear what they say." It was admitted before their Lordships that the time of the post between Cape Town and London was nineteen days, and it may reasonably be assumed that this letter was answered, and that Percy Schweder had received their opinion before October 21. The correspondence between him and the firm in London was not put in by the respondents. On September 9 the appellant again wrote to Percy Schweder, referring to his letter of August 16, and the reply to it, and submitting an outline of business on the new basis he proposed that it should in future assume. In it he says: "The season will soon be upon us, and if you wish to wait the exchange of letters with London before finally agreeing, I further suggest that we commence working on these lines on the understanding that the agreement may be cancelled if letters you shortly expect veto it." This was relied upon by the learned counsel for the respondents; but Percy Schweder in his reply of September 14, where he discusses the proposals, does not take any notice of it, only saying that he should not think of taking a new departure like this without a personal interview.

The interview took place at East London on Saturday, October 21. The appellant in his evidence said: "I met Mr. Schweder at Boorman's Hotel. Off and on we spent the whole day discussing the matter; I was most of my time there with him discussing the future working of Natal agency. Certain conditions were reduced to writing late on Sunday night. The matter was very much discussed on Saturday and Sunday. We both agreed to put our agreement in writing. He reduced it to writing, and I now see this document. It was entirely his own composition. I merely threw in a word now and then. After he had written it out, at his suggestion I wrote a copy of it for him. This writing I also see. The one he wrote is not dated. My copy is dated October 21, 1893, the date being in Schweder's. This was done on Sunday because I was leaving early on Monday morning. I suggested I should sign his copy and he mine. He said I am not very particular about formal documents. I think you had better go back to Natal and elaborate it in a letter addressed. It was a bargain then and there. He said, 'I hope you leave East London in good

J. C. 1897 PEARSE v. SCHWEDER & Co.

spirits for the new season.' I said I was satisfied it was a fair arrangement. There was not one word said about its being provisional, or that it was subject to veto or ratification from London; I had no such idea in my mind, and I also acted accordingly." The appellant also said that a proposal as to the union of Schweder & Co.'s business with Flack and Company was discussed at considerable length, and he believed the arrangement Percy Schweder thought of was to be subject to ratification in London. The two copies were put in evidence. Percy Schweder was not called as a witness, and this evidence of the appellant is uncontradicted. The only explanation of his not being called is in a letter of the respondents' solicitors in which it is said that he was debarred from coming to Natal by a threat of arresting him.

One of the terms in the writings is that the respondents were to provide the appellant with a clean overdraft at a bank for 2000*l.*, and R. Richards, the father-in-law of the appellant, was to stand guarantor for the proper application and faithful repayment to the extent of 1000*l.* of such overdraft. In their plea the respondents say that Richards did not give a guarantee in the terms of the "treaty or negotiation," and this objection was taken before their Lordships. Richards was examined as a witness, and said that he had always been willing to become a guarantor on the basis set out in the agreement, and considered himself bound by his letter of October 26. In this letter addressed to the respondents' firm, which he said he handed to the appellant for Percy Schweder, he gave a guarantee for 1000*l.*, and it appears in his letter of November 4 that Percy Schweder had received it. The terms of this guarantee are, in their Lordships' opinion, sufficient to satisfy the provision in the memorandum of agreement.

On October 27, 1893, the appellant wrote a letter to Percy Schweder, in which he said: "For convenience sake I recapitulate the terms arranged in East London for the conduct of your Natal business during the coming season." The recapitulation was substantially the same as the memorandum made at East London, but was not in the same words. On November 4 Percy Schweder replied to this letter, objecting to parts of it as

not entirely following the headings and terms of the memorandum, and saying that the guarantee was not sufficient. The appellant replied to this on November 11, and on November 17 Percy Schweder wrote to him thus: "Agreement.—I think it will be better to have it set forth clearly; at the same time now that we are agreed in principle and have all the points thereof defined through our exchange of letters the matter can rest till I get to Durban, which, however, will not be as early as I hoped." The letter of November 4 contained instructions to the appellant to buy skins, which he did to a considerable extent, and, an account having been opened with the bank of Africa, there was on December 14 an overdraft of 850*l*. On that day Percy Schweder sent a telegram to the appellant: "Schweder's, London, write me not complete proposed agreement nor grant clean overdraft. Consequently instructed bank you will repay amount taken cancelling remainder," and on the same day he wrote a letter saying that the proposed arrangement must fall through and be abandoned.

The defendants' counsel called no witness, and the jury found that a binding agreement was made on October 21, 1893, and was acted upon, and assessed the damages at 750*l*. Thereupon judgment was entered for the plaintiff. On September 1, 1894, an application was made to the Supreme Court for an order setting aside the verdict and judgment and entering judgment for the defendants, or absolving them from the instance or granting a new trial. On September 11 the Court ordered the judgment to be turned "into absolution of defendants from the instance," which was understood on the hearing of the appeal to be a judgment for the defendants setting aside the verdict.

Now, before the verdict could be set aside it was necessary to determine whether, upon the evidence before the jury, it was one which they could reasonably find. In their Lordships' opinion it was, and they do not see any ground for setting it aside and granting a new trial, still less for entering judgment for the defendants. There was certainly evidence for the jury to consider. From the reasons of the learned judges stated in the supplemental record, it appears to their Lordships that the order was made on the ground that the Court did not agree

J. C. 1897 PEARSE v. SCHWEDER & Co.

with the jury, and thought the verdict was wrong. The Chief Justice says: "We have heard and carefully considered the facts in this case, and have had the benefit of the correspondence both before and after this alleged contract of October 22, and we have come to the conclusion that there was no completed contract on which the plaintiff could succeed in a court of law." In another part he says: "My impression is that they settled the terms between themselves, subject to adoption by the English firm, and that they had not corrected the terms between them. When the corrections came before the English firm the arrangement was altered in several particulars; and those alterations shew me that the East London contract was not a completed contract; it was intended to be supplemented by a more formal document." Wragg J. says: "I am not satisfied that there was a completed contract between the parties." And at the end of his reasons he says: "In strict law the verdict ought not to stand. As to substantial justice, I do not think that it has been done by the jury." Turnbull J., referring to Percy Schweder's letter of November 4, says: "From that and the correspondence which followed, it is clear to me that there never was a completed contract between the parties, and that the jury were mistaken in arriving at the verdict pronounced." In fact, the learned judges appear to have considered the application to set aside the verdict as if they were a court of appeal upon the facts, and were at liberty to decide upon the evidence which party was entitled to judgment. No authority in the law of Natal was produced to shew that they have this power. If they have, their Lordships think that in this case they have come to a wrong conclusion upon the evidence. They are of opinion that there was not sufficient ground for setting aside the verdict and judgment for the plaintiff, and will humbly advise Her Majesty to reverse the order of the Supreme Court, and order the application of September 1 to be refused with costs. The respondents will pay the costs of this appeal.

Solicitors for appellant: *Atkinson & Dresser.*

Solicitors for respondents: *Hollams, Sons, Coward & Hawksley.*

[PRIVY COUNCIL.]

CITY OF MONTREAL . . . . . APPELLANTS; J. C.* 1897

AND

STANDARD LIGHT AND POWER COMPANY . . . . . RESPONDENTS. *July 27; Aug. 3.*

ON APPEAL FROM THE COURT OF QUEEN'S BENCH IN THE PROVINCE OF QUEBEC.

Quebec Act (55 & 56 *Vict. c.* 77), *s.* 5—*Construction—Power to Lay Wires Underground—Right to Excavate Streets.*

Sect. 5 of the respondent company's incorporating Act (55 & 56 Vict. c. 77) empowers it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes, and public places as may be deemed necessary for the purpose of supplying electricity and gas :—

Held, that the power to open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted.

APPEAL from an order of the Court of Queen's Bench (Oct. 3, 1896), affirming an order of the Superior Court of Quebec (Sept. 21, 1896), granting a perpetual injunction against the appellants.

The facts are stated in the judgment of their Lordships.

Sir E. Clarke, Q.C., and *Paget*, for the appellants, contended that the soil of the streets, or at least the surface and so much below the surface as was necessary for the appellants' purposes, was vested in them. Apart from the question of property, the control and authority over the streets was vested in them. On either ground they were entitled to prevent the respondents from breaking up and excavating the streets without their consent; and s. 5 of the respondent company's Act did not on its true construction authorize the company to disregard the control and consent of the municipality.

* *Present:* LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and SIR HENRY STRONG.

J. C. 1897

CITY OF MONTREAL v. STANDARD LIGHT AND POWER COMPANY.

Haldane, Q.C., and *R. C. Smith*, for the respondents, were not heard.

1897. Aug. 3. The judgment of their Lordships was delivered by

LORD MACNAGHTEN. On September 10, 1896, about half-past two o'clock in the afternoon, workmen in the employ of the respondent company or their contractors broke up the surface of St. Antoine Street, in the city of Montreal, and began to excavate the soil for the purpose of laying underground wires along the street.

In the course of the same afternoon the city surveyor and the police officials, acting, as was admitted, under instructions from the municipal council of the city, interfered by force and compelled the men employed to abandon their operations.

On the following day, September 11, the respondents filed their petition in the Superior Court praying for an injunction to restrain the city from interfering with their contractors and workmen.

After some interlocutory proceedings, Tait J. granted an injunction on September 21, subject to a temporary suspension of the order.

The city immediately appealed to the Court of Queen's Bench for Lower Canada.

The appeal came on to be heard on September 25, and on October 3 the Court delivered an unanimous judgment, dismissing the appeal with costs. From that decision the present appeal has been brought.

Their Lordships have before them the reasons of Tait J. and the opinions of Sir Alexander Lacoste C.J. and Wurtele J., in which the other learned judges concurred. They agree entirely in the conclusion at which the Provincial Courts arrived and the reasons assigned for that conclusion.

The respondents were incorporated in 1892 under the name of the St. Henri Light and Power Company by the Act 55 & 56 Vict. c. 77. It is only necessary to refer to four sections in this Act. Sect. 5 empowers the company to manufacture and deal in electricity, gas, and other illuminants, and proceeds to

declare that the company "may lay its wires . . . . underground as the same may be necessary and in so many streets squares highways lanes and public places as may be deemed necessary for the purposes of supplying electricity and gas for light power and heating the whole however without doing any unnecessary damage and providing all proper facilities for free passage through the said streets squares highways lanes and public places while the works are in progress."

Sect. 6, which has been replaced by a more elaborate enactment, empowered the company to erect posts and supports for conducting their wires overhead.

Sect. 18, which is still in force, is in the following terms:—

"18. Before commencing the laying of wires or pipes or the erection of waterways the company shall make a report to the Commissioners of Agriculture and Public Works of the province of such works and shall send a copy thereof to the council of the municipality in which such works are so projected."

Sect. 25, which is now repealed, declared that "The company may only exercise the privileges conferred upon it by the present Act upon complying with the rules and regulations which exist or may be hereafter adopted by the municipal authorities on the subject."

The Act of 1892 was shortly afterwards amended by the Act 56 Vict. c. 73, which received the Royal assent on February 27, 1893. By that Act the name of the company was changed to the Standard Light and Power Company.

Sect. 25 of the Act of 1892 was repealed altogether, and s. 6 was replaced by an enactment which contains a proviso in the following terms:—

"The municipal council in all cities towns or incorporated villages if they deem necessary shall have the right to oversee and prescribe the manner in which . . . . streets roads and highways shall be opened . . . . for the placing of wires underground."

The combined effect of the two Acts, therefore, is that, having made the report required by s. 18 of the Act of 1892, and having sent a copy thereof to the council of the municipality in which the proposed works are projected, the company becomes entitled

J. C. 1897

CITY OF MONTREAL v. STANDARD LIGHT AND POWER COMPANY.

to lay its wires subject to the right of the municipal council, if they deem it necessary, to oversee and prescribe the manner in which the streets are to be opened for the placing of the wires underground, and subject, of course, to the general provisions enacted by the Legislature for the convenience and safety of the public.

On May 15, 1896, the company sent to the municipal council a notification referring to the right of supervision reserved to the municipality, and intimating that they intended to exercise the powers conferred upon them for laying underground wires for the purpose of conveying electricity through or along certain streets in the city of Montreal, including St. Antoine Street.

On August 22, 1896, the company duly made a report to the Commissioners of Agriculture and of Public Works of the works they proposed to commence in the city of Montreal with a plan annexed, and on August 24 they sent a copy of the report and plan to the municipal council, requiring them within ten days to prescribe the manner in which the streets mentioned in the report were to be opened, and stating that in case of default they would proceed with the works, taking all due precautions, and would lay their wires underground according to the report without doing any unnecessary damage, and providing all proper facilities for free passage while the works were in progress.

No notice whatever was taken of this communication, and so on September 10 the works were commenced, and then the proceedings took place which led to this litigation.

Their Lordships are unable to find any justification in law for the action of the appellants. The language of the Legislature is too plain to leave room for argument. The appellants, indeed, contend that it is hardly possible to conceive that the Legislature could have meant to confer such extraordinary powers upon a mere trading company as to authorize them at their will and pleasure to interfere with public streets the care of which is committed to the municipality, and they suggest that s. 5 of the Act of 1892 may be construed as defining the objects of the company and enabling them to lay down their wires provided they first obtain the consent of the city. It is

true that the section does not in express terms authorize the company to open streets, but that power is plainly involved in the authority given to them to lay their wires underground, and it is impossible to read s. 25 of the Act of 1892 without seeing that s. 5 confers upon the company powers and privileges which but for s. 25 they would have been at liberty to exercise without interference from any quarter.

Then it was argued that the company were bound to give the municipality reasonable time for considering their plans, and it was urged that a period of ten days was much too short a notice for a great municipal body, which must necessarily proceed in a somewhat leisurely fashion. Regular councils, it was said, were only held once a month, and although a special council could be summoned at two days' notice, the respondents could hardly expect the municipal council of the city of Montreal to depart from their ordinary course for their convenience. There is, however, nothing to be found in the Act justifying the position taken up by the municipality, and, considering that as early as May the company gave formal notice that they intended to exercise their powers, although certainly the notice was not one which the municipal council were bound to recognise, it is plain that provision might easily have been made for the emergency even if the council could not bring themselves to summon a special meeting for such an occasion.

When it is urged on behalf of the municipality that the Legislature would not intentionally have put upon them the indignity of subordinating their authority to the ends and purposes of a trading company, it may be replied that the Legislature does not seem to have anticipated any friction or jealousy between two bodies which might be expected to work together for the benefit of the public. The amending Act which repeals s. 25 in the Act of 1892 expressly authorizes municipal corporations to take shares in the company and aid the company by bonus loans or advances, or by guaranteeing the payment of bonds, or by granting it such privileges and exemptions as the council of any such municipal corporation might deem advisable.

Their Lordships are of opinion that the respondents acted

J. C. 1897 CITY OF MONTREAL v. STANDARD LIGHT AND POWER COMPANY.

within their powers in opening St. Antoine Street, that the municipality were not justified in obstructing their works, and that the injunction was properly granted.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of this appeal.

Solicitors for appellants: *Wilde, Moore & Wigston.*
Solicitors for respondents: *Ingle, Holmes & Sons.*

[PRIVY COUNCIL.]

J. C.* 1897 *May* 19; *July* 3.

THE OWNERS OF THE NORWEGIAN S.S. "NORMANDIE" . . . . . } DEFENDANTS;

AND

THE OWNERS OF THE BRITISH S.S. "PEKIN" . . . . . } PLAINTIFFS.

THE "PEKIN."

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Regulations for Preventing Collisions at Sea, 1884, *Art.* 22—*Crossing Vessels in Rivers.*

Art. 22 of the maritime rules, which relates to vessels "crossing so as to involve risk of collision," must be distinguished in its application, (1.) as regards vessels navigating the open sea; (2.) as regards vessels passing along the winding channels of rivers. In the latter case the vessels must follow, and must be known to intend to follow, the curves of the river bank:—

Held, in this case, that the defendant vessel, though she ported her helm, kept the course prescribed by the nature of the locality; and that at the moment of porting the vessels were not crossing vessels within the meaning of art. 22, since the reasonable inference, having regard to the locality and their previous courses, was that they would avoid collision.

The Leverington, (1886) 11 P. D. 117, distinguished.

APPEAL from a decree of the Supreme Court (May 26, 1896) in an action for damages by the appellants, the respondents counter-claiming in respect of the same collision.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and SIR FRANCIS JEUNE.

The facts are stated in the judgment of their Lordships.

The Chief Justice found that the *Pekin* was properly navigating on the starboard side of the channel and was right in porting her helm at the Old Dock Buoy, and that by the latter alteration she could not be held to have failed to keep her course within the meaning of art. 22. He was advised by his assessor, and found as a fact, that at the time of the collision the *Pekin* had no way through the water, and was not guilty of any of the alleged breaches of the regulations, and took all due measures to avoid the collision. On the other hand, the Chief Justice was further of opinion that the *Normandie* was entirely to blame for the collision, and that she had not shewn any justification for her failure to comply with the rules of navigation. He found as a fact that the collision was caused by breaches on the part of the *Normandie* of arts. 16, 18, 22, and 24, and that she improperly failed to keep out of the way of the *Pekin*, to keep to the starboard side of the channel, to stop and reverse her engines in due time, and to take measures to avoid the collision by dropping her anchor, as she might have done in time to avoid the collision.

A part of the judgment was given upon the counter-claim, and was to the following effect: "And this Court doth further declare that the plaintiffs are liable for all damages and losses occasioned to the defendants by reason of the said collision." But on June 16, 1896, the Chief Justice refused to order that the damages sustained by the defendants should be assessed against the plaintiffs and final judgment entered for them. He came to this conclusion, it was understood, upon the authority of the *Imperial Japanese Government* v. *P. & O. Steam Navigation Co.* (1)

The Regulations of 1884, arts. 21 and 22, are as follows:—

"Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

"Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

(1) [1895] App. Cas. 644.

J. C.
1897
OWNERS OF NORWEGIAN S.S. "NORMANDIE" v. OWNERS OF BRITISH S.S. "PEKIN."
THE "PEKIN."

Joseph Walton, Q.C., and *Dr. Stubbs*, for the appellants, contended that the collision was caused solely by the negligent navigation of the *Pekin* by the respondents or their servants. The helm of the *Pekin* was improperly and at an improper time ported, whereby the *Pekin* improperly altered her course, whereas if she had kept her course there would have been no collision. A good look-out was not kept on board, and after risk of collision the *Pekin* did not slacken speed or stop and reverse her engines in due time. She infringed arts. 18, 22, and 24. The appellants were not to blame, since they were justified in heading for the Shanghai Channel on the north side of the river. [Reference was made to *The Leverington*. (1)]

Sir W. Phillimore and *Batten*, for the respondents, contended that the evidence shewed that the *Pekin* was entitled in coming up the river to use the Pootung Channel, and was properly navigated in such channel, and that she thereafter kept her course and kept to the starboard side of the channel. In porting her helm to keep to the starboard side of the channel at the Old Dock Buoy she was navigated according to the rules, and did not fail to keep her course within the meaning of art. 22. There was no evidence that she infringed arts. 18 or 24. The *Normandie* was solely to blame for the collision, which was caused by her not keeping her proper side of the channel. [Reference was made to *The Velocity* (2), *The Ranger* (3), and *The Oceano*. (4)]

Walton, Q.C., replied.

1897
July 3.

The judgment of their Lordships was delivered by

SIR FRANCIS JEUNE. This is an appeal from a decision of the Supreme Court for China and Japan sitting in Admiralty, in which the S.S. *Normandie* was held alone to blame for a collision which took place between her and the S.S. *Pekin* in the River Whangpoo on April 3, 1896.

Much depends upon the locality of the collision. At Pootung Point the Whangpoo makes a sharp bend towards the south, returning indeed on its course at something more than a right

(1) 11 P. D. 117.
(2) (1869) L. R. 3 P. C. 44.
(3) (1872) L. R. 4 P. C. 519.
(4) (1878) 3 P. D. 60.

angle, and to the eastwards of that point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside, and the southern the outside channel. The westernmost of these buoys is known as the Old Dock Buoy. The *Pekin* was proceeding up the inside channel along the line of buoys, that is to say on the starboard side of that channel, and the *Normandie* was coming down the river to the southward of mid-channel. It is clear that when near the Old Dock Buoy the *Pekin* ported, and that at or about the same time the *Normandie* starboarded. The *Normandie* afterwards endeavoured to port, but her helm failed to act owing to what is termed the "Chow Chow" water, which is, it would appear, a well-known area of eddies or whirlpools off Pootung Point. The result was that a collision occurred well to the north of the river, and somewhat to the eastwards of Pootung Point, the stem of the *Normandie* striking the port bow of the *Pekin*.

The evidence is not clear as to the whistles given by the two vessels. The learned Chief Justice of the Supreme Court has found that "at the same time two blasts of the *Normandie's* whistle were blown as a signal to the *Pekin*, those on board the *Pekin* simultaneously blew one blast of her whistle." Those on the *Pekin* dispute the double blast of the *Normandie;* but their Lordships think that, accepting as they do the above finding as correct, it may well be that one of the two whistles of the *Normandie* coincided with the one whistle of the *Pekin*, and so those on the *Pekin* heard only one whistle from the *Normandie*, and believed that only one was given.

The appeal raises the question of the conduct of both vessels. As regards the *Normandie*, their Lordships entertain no doubt of the correctness of the judgment of the learned Chief Justice condemning her. They agree with his view that "the spot where the collision took place is not in dispute, and it is impossible to look at it and not see that the *Normandie* was improperly navigated to bring her there." It would appear that both up-going and down-going vessels navigate the inside and outside channels indifferently; but without deciding whether, under the circumstances, it was the duty of the *Normandie* to

J. C. 1897

OWNERS OF NORWEGIAN S.S. "NORMANDIE" v. OWNERS OF BRITISH S.S. "PEKIN."

THE "PEKIN."

take the outside channel, it is clear that, even if she elected to go by the inside channel, she should never, if proceeding for the starboard or southern side of it, have got so near to the north bank of the main channel. The learned Chief Justice has held further that the *Normandie* was to blame for not stopping and reversing; and in this decision also their Lordships concur.

With regard to the conduct of the *Pekin*, two charges are insisted on by the learned counsel for the appellants. First, it is contended that the two vessels were crossing vessels within the meaning of art. 22, and that the *Pekin* failed to keep her course; and, secondly, that the *Pekin* did not stop and reverse in due time.

The first of these charges raises the question, were those two vessels crossing vessels within the meaning of art. 22? and also the further question whether the *Pekin* kept her course?

The effect of art. 22 has been made clear by several authorities. The cases of *The Velocity* (1), *The Ranger* (2), and *The Oceano* (3) have explained and illustrated the distinction which exists in the effect of this rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to in art. 22 is "crossing so as to involve risk of collision," and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow, the curves of the river bank. But vessels may, no doubt, be crossing vessels within art. 22 in a river. It depends on their presumable courses. If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment,

(1) L. R. 3 P. C. 44. (2) L. R. 4 P. C. 519.
(3) 3 P. D. 60.

they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.

Their Lordships have re-stated these propositions because they appear to them decisive of this part of the present case. They are advised by their assessors, and it appears to them clear, that, having regard to the features of the locality at the time the *Pekin* ported her helm, that is to say when she was near the Old Dock Buoy, the vessels were not crossing vessels within the meaning of art. 22. It was reasonable for those on the *Pekin*, as, without fault on their part, they did not hear the double blast of the *Normandie* before they took action with their helm, to assume that the *Normandie* would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision.

The above considerations shew the distinction between the present case and that of *The Leverington* (1), which was relied on by the appellants. In that case the vessels were held by the Court of Appeal to be, as they unquestionably were, crossing vessels within the meaning of art. 22. The *Leverington* coming up the Cardiff Drain at a place before it divides (as it then did) into the channels leading to the East Bute Dock and the Roath Basin respectively, and proceeding for the East Bute Dock (as appears from a full report of the judgment of the Lord Chancellor) had the *Rapid*, which was in the channel leading to the Roath Basin, three or four points on her starboard bow. She slightly quickened her speed for the purpose of crossing the bows of the *Rapid* and so keeping out of her way, and would have accomplished her object had not the *Rapid* frustrated it by porting. It is clear that the two vessels were crossing each other's courses, for they could not else have

(1) 11 P. D. 117.

J. C.
1897
OWNERS OF NORWEGIAN S.S. "NORMANDIE" v. OWNERS OF BRITISH S.S. "PEKIN."
THE "PEKIN."

reached their destinations, and at a time which involved a risk of collision; and it is equally clear, especially having regard to the extreme narrowness of the channels, that the *Rapid* should have been aware of the fact.

The learned Chief Justice in the Court below has based his judgment not so much on the above view as on the conclusion at which he has arrived that the *Pekin* did in fact, though porting her helm, keep her course. She did so because, owing to the bend in the river, that was the proper and ordinary method of reaching the starboard side of the main channel for a vessel which had been coming up by the outside portion of the divided channel. This is also the view of their Lordships' assessors, and their Lordships agree with it.

The remaining question is whether the *Pekin* reversed her engines in due time. There is evidence which was pressed with considerable force against the *Pekin* on this point. According to the account given on her behalf, and as the learned Chief Justice has found, she reversed her paddles when the vessels were only 300 feet apart. It is clear that she stopped her engines without reversing them at an earlier time, and it is urged that, though she may have brought herself to a standstill by the time of the collision, had she reversed sooner the collision would have been avoided. The evidence of the captain of the *Pekin* is as follows: "When I first distinguished the *Normandie* I was at the Old Dock Buoy, and he looked to me as if he was about opposite Ariel. I then ordered one whistle, and go slow and port a little; whistle was blown, ported, and the speed slackened. He seemed to be going neither one side nor the other. . . . My next orders were to blow one whistle and stop. I heard these executed. When he was 300 ft. from me I went full speed astern." It is clear, therefore, that when, or even before, the *Pekin* stopped her engines, the situation was seen to be one of difficulty, and that the engines were not reversed until after an appreciable interval. It is of the utmost importance that vessels should reverse their engines in order to bring themselves to a stop as soon as ever risk of collision arises, and if their Lordships were sitting as a Court of First Instance in the present case they might find it difficult to say that the

Pekin fulfilled her duty in this respect. But there is nothing on the notes of the evidence to shew that those responsible for the navigation of the *Pekin* were asked to explain why they did not reverse their engines at an earlier time, and there is nothing from which it can be clearly made out what was the length of the interval of time which separated the orders to stop and to reverse. The learned Chief Justice, however, saw the witnesses, and heard their evidence given at full length, and not in the abbreviated form in which it appears on the notes. He evidently had his attention directed to the point, and he has found that "before the collision the *Pekin* was not proceeding at an improper rate of speed, and that she took all the measures she could by stopping and reversing her engines to avoid the collision." From this decision their Lordships do not feel it necessary to dissent.

The appeal must, therefore, be dismissed with costs, and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for appellants: *Stokes & Stokes.*

Solicitors for respondents: *Waltons, Johnson, Bubb & Whatton.*

[PRIVY COUNCIL.]

J. C.* 1897 July 12, 22, 31.

BANK OF AUSTRALASIA . . . . . DEFENDANTS;

AND

PALMER . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Admissibility of Evidence—Parol Evidence—Written Agreement.

Parol evidence cannot be said to be improperly admitted as contradicting or varying a written agreement, when it relates to the circumstances under which the plaintiff's name was appended to a document which was no part of the agreement, but which was placed before him for signature by the defendant after the agreement was concluded.

APPEAL from an order of the Supreme Court (Dec. 20, 1895), discharging a rule nisi to set aside a verdict and for a new trial, or to enter judgment for the defendants.

The facts and proceedings are stated in the judgment of their Lordships.

Sir R. Reid, Q.C., V. Hawkins, and *H. M. Davidson,* for the appellants, contended that, the parties having reduced to writing certain terms on which an advance by way of overdraft was to be made by the bank to Palmer, parol evidence was not admissible to contradict or qualify those terms. The jury should have been directed on the letters and other evidence properly admissible in the action to find a verdict for the appellants. Reference was made to *Davis* v. *Jones* (1); *Hotson* v. *Browne* (2); *Malpas* v. *London and South Western Ry. Co.* (3); *Lindley* v. *Lacey* (4); *Preston* v. *Merceau* (5); *Rogers* v. *Hadley* (6); *Stones* v. *Dowler.* (7)

* *Present:* LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. WAY.

(1) (1856) 17 C. B. 625.
(2) (1860) 9 C. B. (N.S.) 442.
(3) (1866) L. R. 1 C. P. 336.
(4) (1864) 17 C. B. (N.S.) 578, 586.
(5) (1779) 2 Wm. Bl. 1249.
(6) (1861) 32 L. J. (Ex.) 241.
(7) (1860) 29 L. J. (Ex.) 122.

J. C.
1897
BANK OF AUSTRALASIA v. PALMER.

Lawson Walton, Q.C., and *E. Morten*, for the respondent, contended that the evidence objected to was properly admitted; for that it did not purport to vary that which constituted the real agreement, but only to explain a document which the evidence shewed was superfluous. Reference was made to *Lee* v. *Lancashire and Yorkshire Ry. Co.* (1); *Bolckow* v. *Seymour.* (2)

Sir R. Reid, Q.C., replied.

1897
July 31.

The judgment of their Lordships was delivered by

LORD MORRIS. This is an appeal from an order of the Full Court discharging with costs a rule nisi for a new trial in an action brought by the respondent Walter Harcourt Palmer as plaintiff against the appellants, the Bank of Australasia. The plaintiff claimed damages for the dishonour of a cheque. He alleged that the cheque was drawn in pursuance of an agreement under which the bank were to allow him an overdraft or cash credit for six months certain, and that it was dishonoured in breach of that agreement.

The only question on the appeal, and apparently the only question argued before the Full Court, was whether the judge at the trial was in error in admitting evidence of a conversation which took place between the plaintiff and Mr. Bradhurst, the bank manager at Marrickville, on October 4, 1894. The appellants contended that the evidence ought to have been rejected, because according to their view it was offered in contradiction of the written agreement, or part of the written agreement, between the parties. The respondent's case was that the evidence in question was properly admitted in order to explain the circumstances under which his name was appended to a document which was no part of the agreement, but which was placed before him for his signature by Mr. Bradhurst after the agreement was concluded.

The case was tried before Innes J. and a jury of four persons. The trial lasted five days. The evidence abounded in contradictions between the bank manager and the plaintiff as to what was said at various interviews. In order to enable the jury to come to a satisfactory conclusion on the whole case,

(1) (1871) L. R. 6 Ch. 527. (2) (1864) 17 C. B. (N.S.) 106.

J. C. 1897 BANK OF AUSTRALASIA v. PALMER.

the plaintiff was recalled three times and Mr. Bradhurst twice. And the contradiction between them became more and more hopeless. With all this conflict on matters for the most part of little or no importance, it is satisfactory to find that there was no dispute or controversy either as to the fact or the terms of the particular conversation on the alleged improper reception of which the application for a new trial was founded. The bank manager, who seems to have been ready to contradict almost everything that anybody else said in the course of the trial, was silent on this part of the case.

The material facts bearing on the present question may be stated shortly. In September, 1894, the plaintiff, who was a civil engineer, had on his hands an unfinished contract with the Hillgrove and Armidale Water Power and Electric Supply Company, Limited. To enable him to complete the job and earn the money payable under the contract an advance of 2000*l.* was required for six months certain. The advance would be useless to him, as he says he told the bank manager, unless it continued for six months. He applied to the bank. He was not a customer of theirs, and they declined to accede to his application.

Ultimately, however, according to the plaintiff's story, it was arranged that the required accommodation should be granted on the guarantee of his mother, who had an account with the bank, and on the deposit of her deeds as a security for the advance. The arrangement seems to have been made on October 3, 1894. On October 4 the plaintiff and his mother attended at the bank to complete the transaction. Mrs. Palmer's deeds were at the time held by the bank for safe custody. According to her Mr. Bradhurst said, "I have all these deeds, and I am satisfied with the security." Then she executed two documents put before her by Mr. Bradhurst. They were printed forms in use by the bank. One was headed "General Lien," the other "Guarantee for Existing or New Advance." At the foot of the guarantee there was a note signed by her to the effect that she understood she was "individually liable for the amount expressed in the foregoing bond namely two thousand pounds (2000*l.*) and interest." It

was explained to her that she would have to pay the 2000*l.* on April 4 next if the plaintiff made default. In her examination she averred that the plaintiff "said distinctly he wanted the advance for six months, and Mr. Bradhurst agreed to it." In cross-examination she added, "It was all settled at the time when I signed the guarantee."

The two documents executed by Mrs. Palmer were produced by the bank at the trial, and put in evidence during the plaintiff's examination-in-chief. With them the bank also produced a printed form of application for an advance signed by the plaintiff. It was put in at the same time. It would appear from Mr. Bradhurst's evidence that this document was not signed by the plaintiff until Mrs. Palmer had completed her part of the arrangement. It is in the following terms, and all in print except the words "an advance of 2000*l.*" and the words "4th April 1895."

"(172 Advances Overdraft Application Letter.)

"To the Manager,

"Bank of Australasia, Marrickville.

"Dear Sir, 4th October 1894.

"Be good enough to allow $\frac{me}{us}$ an advance of 2000*l.* which amount or so much as may be availed of is to be repaid together with with interest at current rates as follows: viz. 4th April 1895 or on demand at your discretion.

Fill in 'an advance' or 'renewed advance.'

"This letter supersedes any previous application made to you for similar accommodation.

"Yours faithfully,

"W. Harcourt Palmer.

"(Endorsed): Due 4th April 1894."

No question was asked about this document in the plaintiff's examination-in-chief or in his cross-examination. But at the end of the cross-examination the learned counsel for the bank proposed to amend by pleading that the advance was repayable on demand—a defence which the learned judge thought admissible under the plea of non assumpsit. And then the learned counsel for the plaintiff, being thus put on his guard, re-

J. C. 1897 BANK OF AUSTRALASIA v. PALMER.

examined with the view of explaining the circumstances under which the document was signed. And the following passage occurs in the judge's notes of the evidence:—

"*In re-examination.*—I signed this application (plaintiff's Exhibit D marked No. 1). The words and figures '4th April 1895' is in Mr. Bradhurst's writing. 'Or on demand at your discretion' is in print. Seeing the printed words I asked Mr. Bradhurst 'Could you call up the overdraft at any time?' And he said 'Certainly not.' And he then wrote in the words '4th April 1895.' The words at the back are I can't say in whose writing."

On October 4 and in the course of the next few days the plaintiff drew on the bank for about 880*l.* These drafts were duly honoured, but according to the case of the bank merely as a matter of indulgence. On October 16 the plaintiff drew again for 300*l.* Payment was refused on the ground that as a matter of right he was not entitled to draw at all until he had complied with a stipulation on which the bank alleged they had insisted throughout.

In the view of the bank, it was an essential part of the arrangement that the plaintiff should give a first charge on the assets of the Hillgrove and Armidale Water Power and Electric Supply Company, Limited. The plaintiff admitted that a charge on the company's assets was to be given, but he said the stipulation was made for the protection of his mother, and that the bank was not concerned in it directly. Moreover, he denied that the charge was to be a first charge. In the result the jury seem to have taken the plaintiff's view; but it is impossible not to see that there was a substantial foundation for the contention advanced by the bank, and it is obvious that the plaintiff's alleged default in regard to the proposed charge on the Hillgrove Company's assets was the real ground for breaking off the arrangement, and intended to be the real and the only defence to the action.

The learned judge left to the jury the following specific questions, in accordance apparently with the suggestion of the counsel for the bank:—

1. Was the contract between the plaintiff and the defendant

bank one to allow an overdraft of 2000*l.* which might be called up at the discretion of the bank at any time before the expiration of the six months?

2. Or was the contract that the bank should not call up the overdraft or terminate the arrangement until the expiration of the six months, i.e., on April 4?

3. Was it a condition precedent to the allowing of the overdraft at all that the first charge upon the assets of the Hillgrove and Armidale Water Power and Electric Supply Company, Limited, should be given as security for the overdraft?

The jury retired at 10.45 A.M. At 3.50 P.M. both parties consented to accept the verdict of the majority. At 4.40 P.M., however, the jury returned a verdict for the plaintiff for 600*l.* unanimously. The specific questions put to them were answered in writing as follows:—

The contract for 2000*l.* for six months was not terminable at the bank's discretion at any time before the expiration of the six months.

The bank agreed to rely on Mrs. Palmer's guarantee, and the deposit of the documents mentioned by the plaintiff and the first charge upon the assets of the Hillgrove Company were not a condition precedent to the granting of the overdraft.

The argument at their Lordships' bar did not disclose any difference of opinion between the opposing counsel on any point of law. The learned counsel for the respondent admitted as fully as their opponents could desire that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract. The difference between them, such as it was, turned rather on a question of fact. The learned counsel for the respondent pointed out that the overdraft application letter Exhibit D, did not purport to contain the agreement between the parties. It was indeed common ground that the real agreement was not to be found in it. It did not even purport to contain part of the agreement. Moreover, the bank did not

J. C. 1897

BANK OF AUSTRALASIA v. PALMER.

signify their intention to accede to the application, nor did they in terms comply with it. The document was not in the form of an agreement. It was in the form of a proposition; on the face of it it purports to be no more than an application for an overdraft which had as a matter of fact already been granted on other and different terms. It was merely a memorandum of the transaction, not certainly altogether accurate, but one which the bank desired to have in a certain form, possibly for the purpose of facilitating future reference. Obviously the view which the jury took was that Exhibit D was no part of the agreement, and that the agreement was complete without it.

It is somewhat significant, and not perhaps unsatisfactory, to find that neither in the pleadings nor in the correspondence between the bank manager and the plaintiff, when repayment of the advances was somewhat peremptorily demanded, is there a suggestion that the bank had by contract a right to recall the money at their discretion. The point seems to be an afterthought, due perhaps to the ingenuity of counsel.

The view which their Lordships take of this case in accordance with the view of the Full Court will relieve the bank from the apprehension which they seemed to feel that the rejection of their appeal might destroy or impair the efficacy of the ordinary overdraft application letter when used as the basis of an agreement for an advance. Their Lordships, however, cannot help observing that, if the bank should in future contract to advance money for a definite period, and at the same time desire to have the power of recalling the advance at their discretion, thus making the agreement nugatory, it would not be amiss to state clearly what they do mean, and to take care that their meaning is understood by the persons with whom they are dealing.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Farrar & Co.*

Solicitors for respondent: *Clapham, Fitch & Co.*

[PRIVY COUNCIL.]

GAUDER . . . . . APPELLANT; J. C.*

AND 1897

DASSENAIKE AND OTHERS . . . . . RESPONDENTS. *July* 31.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Registration—Priority—Ceylon Land Registration Ordinance VIII. of 1863.

Held, that under s. 39 of the Ceylon Land Registration Ordinance VIII. of 1863, an unregistered deed of ante-nuptial settlement executed by a wife is postponed to subsequently registered mortgage bonds relating to the settled estates and jointly executed by both husband and wife, bonâ fide and for valuable consideration.

APPEAL from an order of the Supreme Court (Aug. 14, 1890) confirmed by a judgment in review (June 30, 1891).

The judgment of August 14, 1890, affirmed an order made by the Special Commissioner's Court of Wella Watte in the island dated October 29, 1889, by which, in the matter of claims under the Land Registration Ordinance, 1877, to the allotment of land situated in the village of Wella Watte, bearing No. 374 in the Registration Plan No. 2, that Court found that the appellant be entitled to a certificate that he was the owner of the said allotment of land, but that his title was subject to incumbrances created by mortgages in favour of the respondents.

The facts are stated in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *Gray*, for the appellant.

Mayne, for the respondents.

The judgment of their Lordships was delivered by

SIR HENRY DE VILLIERS. This is an appeal brought by the trustee under an ante-nuptial deed of settlement against a judgment of the Supreme Court of Ceylon. By that deed, executed in 1865, Frances Gomes, the intended wife, purported to

* *Present:* LORD MACNAGHTEN, LORD MORRIS, MR. WAY, SIR HENRY DE VILLIERS, and SIR HENRY STRONG.

J. C. 1897 GAUDER v. DASSENAIKE.

convey to the trustees thereby appointed, upon certain trusts, land belonging to her and situated in Ceylon. The marriage was duly entered into, but the deed was not registered as required by the 38th section of the Land Registration Ordinance VIII. of 1863. After the marriage the husband, Jonathan Gauder, and his wife, acting jointly, specially mortgaged portions of the land in favour of the respondents for valuable consideration, and the wife specially renounced all privileges to which she would otherwise be by law entitled. The mortgage bonds were duly registered. In 1889 the question was raised before the Special Commissioner under the Land Registration Ordinance, 1877, whether the appellant, who was then sole trustee under the settlement, held an unincumbered title to the land, or whether his title was subject to the incumbrances in favour of the respondents. The commissioner decided in favour of the mortgagees, and his decision was affirmed, on appeal, by the Supreme Court of Ceylon.

The 38th section of the Land Registration Ordinance VIII. of 1863 enacts that every deed or other instrument of transfer, assignment, or mortgage of any land shall be registered in the branch office of the district in which such land is situate. The 39th section then enacts that "every deed . . . . or other instrument as aforesaid, unless so registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed . . . . or other instrument which shall have been duly registered as aforesaid. Provided, however, that fraud or collusion in obtaining such last-mentioned deed or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder." It has not been suggested before their Lordships that there has been any fraud or collusion on the part of the respondents in obtaining the mortgages or in securing their prior registration.

The main question, therefore, to be determined is whether the claims of the respondents are founded upon interests adverse to those of the appellant; and upon this question their Lordships entertain no doubt whatever. The ante-nuptial settlement, upon which the appellant's claim is founded, pur-

ports to convey to him an unincumbered title to the land, whereas the mortgage bonds, by virtue of which the respondents claim a priority of interest in the land, purport to create incumbrances in their favour upon the land. The interests claimed by them are therefore obviously adverse to those claimed by the appellant. Some stress was laid by the appellant's counsel on the fact that the mortgages were executed by the husband and wife, and not, as the prior deed of settlement had been, by the wife alone; but this circumstance cannot affect the decision of the case. The wife was a party to the execution of both deeds, and she could not, by joining her husband with her in the execution of the mortgages, defeat the operation of the ordinance which gives registered deeds priority over unregistered deeds affecting the same land. The respondents, before they advanced money on the security of the land, could only ascertain by means of a search in the registry whether any prior adverse interest had been created by the wife as owner. Finding that her title remained unincumbered, they, for valuable consideration, obtained from her the mortgages in question. Those mortgages were good in point of form whether or not the marriage had been in community of property. If community existed, the execution of the deed by the husband, as being also the representative of his wife, would have been sufficient, but the deed would not be invalid by reason of the wife being a formal party to it. If community did not exist, the formal assistance of the husband was required, but the wife would be a necessary party to the deed. It is unnecessary to inquire what difference it would have made if Mrs. Gauder had not joined her husband in the execution of the mortgages. She was in law and in fact a party to the execution of the unregistered deed of settlement, as well as of the registered mortgages affecting her land, and the 39th section of the ordinance is clearly applicable. The result is that in their Lordships' opinion the appeal should be dismissed, and they will humbly advise Her Majesty accordingly. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Cunliffes & Davenport.*
Solicitor for respondents: *J. J. Freeman.*

[HOUSE OF LORDS.]

H. L. (E.) 1897 July 22.

THE MAYOR, &c., OF THE COUNTY BOROUGH OF DERBY . . . . . } APPELLANTS;

AND

THE DERBYSHIRE COUNTY COUNCIL RESPONDENTS.

Practice — Discovery — Pollution of Rivers — Proceedings in County Court whether Civil or Criminal—Right of Complainant to Interrogate—Rivers Pollution Prevention Act 1876 (39 & 40 *Vict. c.* 75) *ss.* 3, 10.

Where a statute creates an offence and empowers a county court to make an order requiring any person to abstain from committing the offence, and also to impose a penalty upon any person disobeying the order, the county court may in proceedings taken to obtain an order grant discovery against the defendant, since discovery in proceedings to obtain an order could not expose the defendant to a penalty.

So *held* with regard to ss. 3, 10 of the Rivers Pollution Prevention Act 1876.

The decision of the Court of Appeal, [1896] 2 Q. B. 297, affirmed.

THE respondents, the Derbyshire County Council, brought a claim in the county court held at Derby, complaining that the appellants, the corporation of Derby, contrary to the provisions of the Rivers Pollution Prevention Act 1876 Part II. s. 3 and the Rivers Pollution Prevention Act 1893, caused sewage to flow into the River Derwent, and claiming an order under s. 10 of the Act of 1876 requiring the appellants to abstain from that offence &c. The respondents then applied to the county court judge for an order for discovery of documents and delivery of interrogatories. The judge made an order for discovery of documents in the nature of reports, plans and other documents prepared for the local authorities respecting the disposal of sewage, and for the delivery of interrogatories. This order was affirmed by the Queen's Bench Division (1) and by the Court of Appeal. (2)

July 20, 22. *Cozens-Hardy Q.C.* and *W. Graham* for the appellants. The liability of the appellants arises from the

(1) [1896] 2 Q. B. 53. (2) [1896] 2 Q. B. 297.

joint operation of the Rivers Pollution Prevention Act 1876 s. 3 and the amending Act 1893 s. 1, and the result is that when sewage passes through a channel vested in a sanitary authority into a stream, that authority shall be held to permit such passage. The result of such permission is a penalty, and therefore a proceeding under these Acts is of a penal or criminal character. The test is not whether the proceeding is in the first instance to recover a penalty. It is enough, to use Lord Eldon's language in *Claridge* v. *Hoare* (1) and in *Paxton* v. *Douglas* (2), if it is "a step" towards a penalty. In *Harrison* v. *Southcote* (3) Lord Hardwicke said: "A man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only." The object is to abate a nuisance, and Bramwell L.J. in *Reg.* v. *Whitchurch* (4) said that an action or proceeding for this purpose is a "criminal cause or matter." So in an action for penalties in *Hunnings* v. *Williamson* (5) interrogatories and discovery were disallowed.

Stanger Q.C. and *T. G. Carver* for the respondents, were not heard.

LORD HERSCHELL. My Lords, I confess I think this is an extremely clear case. The proceeding pending in the county court out of which this appeal arises was a proceeding under the 10th section of the Rivers Pollution Act, 1876, under which a county court judge has power to order any person to abstain from polluting a river (to put the matter shortly), and he may require him to perform that duty in the manner specified in the order. The fullest discretionary power is conferred upon the county court judge. He can inquire into all the circumstances; he can suspend the order for any time he thinks right. He can accept any undertaking he pleases—he can make it subject to such conditions as he thinks just. Ultimately, having taken everything into consideration, he has to determine what order it is reasonable to make in relation to the complaint that a river or stream is being polluted.

(1) (1807) 14 Ves. 59, 65.
(2) (1812) 19 Ves. 225, 228.
(3) (1751) 1 Atk. 527, 539.
(4) (1881) 7 Q. B. D. 534.
(5) (1883) 10 Q. B. D. 459.

H. L. (E.) 1897 DERBY CORPORATION v. DERBYSHIRE COUNTY COUNCIL. Lord Herschell.

Now, my Lords, in such a proceeding that is the only order which a county court judge can make. In the present case application was made for discovery, and the objection was then taken that the applicant was not entitled to discovery inasmuch as it was a penal proceeding. Of course it is admitted that where a proceeding is one to enforce a penalty, or where a proceeding is one—not that *must* end in a penalty, because the decision may be in favour of the person against whom it is taken, but where the proceeding is of such a nature that it *may* result in a penalty—it is a penal proceeding. I think there has been some confusion between that doctrine and the doctrine that the Court will not allow a party to insist upon a discovery of facts where that discovery may subject the party to a penalty even in some other proceeding. In that case the objection must be either to the particular questions, or to the answering of particular questions, on the ground that the discovery, if given, would subject the party in some proceeding to a penalty. That is not the present case, because, as I shall shew in a moment, the discovery if given here could not possibly assist in subjecting the appellants to a penalty.

But I will deal with the first objection, namely, that this is a penal proceeding—a proceeding which may end in a penalty. It seems to me nothing of the kind. This proceeding never can end in a penalty. All it can end in is an order under such terms and conditions as the county court judge thinks reasonable to prevent or abate a nuisance. The Legislature has provided that if that order is disobeyed then the county court judge may impose a penalty, not exceeding 50*l.* a day, as he thinks reasonable, payable to such persons as he thinks right, upon the authority or person who has disobeyed the order. My Lords, that is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed. The proceeding itself is no more a proceeding that may subject the present appellants to a penalty than is every proceeding which is ever taken in a court of justice. Every proceeding ends, or is expected to end, in an order of some sort, and every order of the Court if disobeyed

(and it is only in the case of disobedience to the order of a county court judge that a penalty can be imposed under the statute) subjects the person disobeying it to a penalty. The Court may inflict various penalties if its orders are disobeyed—in some cases imprisonment. Now, it seems to me that it might just as well be contended that every action or proceeding in court was a penal proceeding on that account as that this is a penal proceeding, because if the order were disobeyed a penalty might be imposed. I do not see either in point of law or in common sense the slightest distinction between the two cases.

So much, my Lords, as regards its being a penal proceeding in which there can be from its nature no discovery at all. If it could be shewn that the discovery sought here was of facts, the disclosure of which might subject to the penalty provided for in the latter part of the section, no doubt there would be foundation for saying that such discovery ought not to be enforced by the Court; but no such question arises here. It has not been shewn that any questions are sought to be asked which would assist in establishing that the appellant in some future proceeding under the latter part of the section would be liable to a penalty. The only penalty imposed is for disobedience to the order. Nothing that they can disclose under the present application for discovery can help to shew that they have disobeyed an order not yet made, which possibly never may be made, and the terms of which at the present moment cannot even be accurately determined. I do not think that the objection to which I have just referred would go to the entire application for a discovery. As I have said, if you are taking objection to a discovery sought, on the ground that it would tend to expose to a penalty, you must either shew that the answers to particular questions if given in a particular way would or might subject to a penalty, or when the questions are put you must take exception to answering them on that ground. No such case really arises here, because, as I have said, no answer whatever to be given to the questions proposed to be put, if they be relevant questions, could be a step towards or assist in any way in exposing the appellants to the penalty.

H. L. (E.) 1897 DERBY CORPORATION v. DERBYSHIRE COUNTY COUNCIL. Lord Herschell.

Indeed, the argument rests entirely upon this, that the discovery would be a step towards exposing to a penalty, because it would be a step assisting the making of an order, disobedience to which order would expose to a penalty. That is a proposition far too wide. It is a proposition which there is not the slightest authority to support, and it is, as it seems to me, most unreasonable.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON. My Lords, in this case I am of the same opinion. I think that the discovery has been legitimately asked in aid of civil proceedings which may lead to an order in terms of the first part of s. 10 of the principal Act. If such an order were made, the discovery which the Courts below have allowed would be of no relevancy in any prosecution for a penalty under the latter part of s. 10, which could only be exacted in consequence of disobedience to the order, and nothing else.

LORD SHAND. My Lords, I concur in the motion to dismiss this appeal, and in the reasons which your Lordships have stated. The proceeding under the statute appears to me to be one having for its object not the obtaining of a decree for a penalty, but a remedial order for the abatement of a nuisance. The fact that disobedience to an order brings with it a liability to a penalty does not, in my opinion, make the original proceeding one of a penal nature, any more than imprisonment to enforce obedience to an order in a civil proceeding would make that proceeding one of a penal character.

LORD DAVEY. My Lords, I am of the same opinion. And I am quite satisfied with the reasons which have been given by the learned county court judge in his very lucid and concise judgment for the order which he made. It appears to me that the fallacy which runs through the whole argument of Mr. Cozens-Hardy and Mr. Graham is the failure to recognise that in this case the penalty is not for letting sewage flow into the stream and pollute the water, but the penalty is for disobedience to the order, and no discovery which is sought for in this pro-

ceeding can in the least degree, rebus sic stantibus, expose the appellants to any penalty. They can only be exposed to a penalty if by reason of their own wilful act they disobey the order when it is made. That appears to me to distinguish the case entirely from the class of authorities to which the learned counsel have referred. For instance, *Reg.* v. *Whitchurch* (1), which the county court judge said had given him most doubt, seems to me an entirely different case. I will assume that the decisions in *Reg.* v. *Whitchurch* (1) and *Mellor* v. *Denham* (2), on which it is founded, were quite right; but in those cases a penalty might have been imposed in the first instance. In *Mellor* v. *Denham* (2) the parent did not send the child to school, and that case was brought before the justices, who dismissed the information. In *Reg.* v. *Whitchurch* (1) the local authority had power to direct a person to fill up an ashpit, abandon the privy and build a pail-closet; they gave a direction accordingly, but he did not obey it. The matter was brought before the justices, and they made an order under the statute upon the person to do those things. Lord Bramwell points out that it is exactly the same as if there were a provision in the Act that a person shall, upon the direction of the local authority, abate the nuisance, and if he does not do it he is liable to a penalty. Those cases appear to me to be entirely distinct from the present case, and, as I have said, for the reasons which were given in the Courts below, I think this appeal ought to be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 22, 1897.

Solicitors for appellants: *Satchell & Chapple.*
Solicitors for respondents: *Wynne, Holme & Wynne.*

(1) 7 Q. B. D. 534. (2) (1880) 5 Q. B. D. 467.

[HOUSE OF LORDS.]

H. L. (E.) 1897 *May* 21, 25, 28; *July* 26.

BOULTER . . . . . APPELLANT;

AND

THE JUSTICES OF KENT AND OTHERS RESPONDENTS.

Licensing Acts—Licence, Objection to—Appeal from Licensing Justices—Party to Appeal—Order for Costs against Objector—Court of Summary Jurisdiction—Summary Jurisdiction Act 1879 *c.* 49 *s.* 31—*Interpretation Act* 1889 *c.* 63 *s.* 13 *sub-s.* 11.

Justices at a licensing meeting are not a court of summary jurisdiction; a refusal of licensing justices to renew a licence is not "a conviction or order"; and appeals to quarter sessions against the refusal to grant a licence are not regulated by s. 31 of the Summary Jurisdiction Act, 1879.

At a licensing meeting a person objected to the renewal of a licence, and it was refused. On appeal to quarter sessions the objector did not appear and the renewal was granted:—

Held, that the Court of Quarter Sessions had no power to make an order for costs against the objector.

The decision of the Court of Appeal, [1896] 2 Q. B. 306, reversed.

Reg. v. *Justices of Glamorganshire*, [1892] 1 Q. B. 621, overruled.

THE following statement of facts is taken from the judgment of Lord Herschell:—

The appellant served upon the licensee of a public-house called "The Duke of Cambridge" a notice of objection to the renewal of his licence, stating as the ground of objection that the licence was not needed to supply the legitimate wants of the neighbourhood.

At the licensing sessions held at Dover on August 26, 1895, the appellant appeared and opposed the granting by way of renewal of the licence. The licensing justices refused to grant the licence.

Thereupon the tenant of the public-house and his lessors, the respondents in the present appeal, served notices upon the licensing justices and their clerk, and upon the appellant, of their intention to appeal to the Court of Quarter Sessions against the decision of the licensing justices.

At the Court of Quarter Sessions neither the appellant nor

the licensing justices appeared to support the decision of the justices. The Court of Quarter Sessions granted a licence in respect of "The Duke of Cambridge" public-house and ordered the present appellant to pay the costs of the appeal, amounting when taxed to 73*l.* 1*s.* 8*d.* The question to be determined was whether they had jurisdiction to make this order for the payment of costs, and this raised the question whether the appeal was made under and was regulated by the provisions of s. 31 of the Summary Jurisdiction Act 1879. The Queen's Bench Division (Lord Russell of Killowen C.J. and Wright J.) discharged a rule for a certiorari to quash the above order of quarter sessions (1) and this decision was affirmed by the Court of Appeal. (2) The justices did not appear upon the present appeal.

May 21, 25, 28. *Asquith Q.C.* and *Horace Avory* (*G. Blaiklock* with them) for the appellant. The objector to the renewal of a licence is not a "party" within the meaning of the Summary Jurisdiction Act 1879 s. 31 sub-s. 5. The Summary Jurisdiction Acts have in fact no application. There is no provision as to the status of the objector: he may be a justice or any member of the public: Licensing Act 1872 s. 42 sub-s. 2. The procedure as to renewals is still regulated by the Alehouse Act 1828 s. 27, which gives the right of appeal only to an "aggrieved" person. There is therefore no power to give costs except as between the party "aggrieved"—that is the publican—and the justices. The only provision as to costs in the case of objection or opposition is in s. 43 of the Act of 1872, and that applies only to the case of a new licence, that Act having made a distinction for the first time between the grant of a new licence and a renewal. The old machinery of 1828 is preserved as to the latter.

Licensing is fundamentally different from summary jurisdiction. In the latter the start is made by information or complaint, and there are thus necessarily two parties. In licensing the first step is application, and the justices have a discretion which is absolute so long as it is judicially exercised: *Sharp* v.

(1) [1896] 2 Q. B. 1. (2) [1896] 2 Q. B. 306.

H. L. (E.) 1897 BOULTER v. KENT JUSTICES.

Wakefield. (1) Appeals in cases of summary jurisdiction are regulated by s. 31 of the Act of 1879. But the appeal must be from a "conviction or order." There is neither conviction nor order in the case of a simple refusal to renew. It is argued that the practice was changed by the Summary Jurisdiction Act 1884, s. 7 of which extends the scope of the Act of 1879 to justices whether acting under Summary Jurisdiction Acts or any other Act, or by virtue of their commission or by common law. That section is repealed and re-enacted by s. 13 of the Interpretation Act 1889 sub-s. 11. But for these provisions to apply there must be summary jurisdiction exercised in a court. Otherwise justices might be required to state a case when issuing a warrant, or considering whether to commit for trial or reading the Riot Act. None of these enactments repeal or modify the necessity of a conviction or order as being the foundation of an appeal in cases of summary jurisdiction. There must be some information or complaint made by one person against another. In a word, there must be a lis, and in the case of objection to the renewal of a licence there is no lis. Notice, too, must be served on "the other party," and this cannot include a member of the public at large. The general law as to costs when convictions have been quashed is considered in *Reg.* v. *Goodall* (2), which was cited in *Reg.* v. *Justices of London.* (3) In the latter case the effect of the Summary Jurisdiction Act of 1884, which repealed many previous enactments and was intended to furnish a general appeal, was considered. It was held that s. 29 of the Alehouse Act 1828 is still in force. But the view taken there that licensing justices who take no active part in an appeal against a refusal are not the real parties, introduces needless confusion. A man is either a party or not a party: there is no intermediate class. The appellant here, however, having taken no active part in the appeal, is entitled to the exemption in this case given to the justices.

The Courts below have followed *Reg.* v. *Justices of Glamor-*

(1) [1891] A. C. 173. (2) (1874) L. R. 9 Q. B. 557.
(3) [1895] 1 Q. B. 616.

ganshire (1), which, approving *Reg.* v. *Mayor of London* (2), makes any act of justices an act of summary jurisdiction. But that decision is wrong. There is nothing in the Summary Jurisdiction Acts of 1879 and 1884, or in the Interpretation Act 1889, to extend the meaning of the term "summary jurisdiction." The Acts of 1879 and 1884 as well as Jervis's Act (11 & 12 Vict. c. 43) are procedure Acts merely, and do not deal with offences created by other statutes. The object of the legislation above referred to is to create uniformity of procedure in appeals from justices whether acting in summary jurisdiction or otherwise. The definition in the Interpretation Act 1889 cannot embrace all acts of justices or other magistrates. Otherwise a justice reading the Riot Act in the street, the Court of Quarter Sessions in which magistrates sit in virtue of their commission, or even the Court of Appeal itself, which would come within the term "or other magistrate by whatever name called," would be a court of summary jurisdiction. To the definition in the Act of 1889 there must be added, "when acting in exercise of their summary jurisdiction": see ss. 6 and 20 of the Act of 1879. By the latter section summary jurisdiction must be exercised in open court, i.e. a petty sessional court or an occasional court-house. The respondents must shew that there was an order or conviction of justices made in pursuance of the Summary Jurisdiction Acts: see Act of 1884 s. 4 sub-s. 2. As to the meaning of the term "order," see *Reg.* v. *Justices of Somersetshire* (3); *Morant* v. *Taylor* (4); *Reg.* v. *Edwards.* (5)

Lawson Walton Q.C. and *H. F. Dickens Q.C.* (*A. H. Bodkin* with them) for the respondents. The objector who sets the ordinary legal process in operation is clearly a party to a litigation. He gives notice of objection to the applicant, and if the latter does not attend he runs the risk of the objection being sustained. An objection to a licence is a complaint or information: *Reg.* v. *Justices of Anglesea* (6); and the refusal

(1) [1892] 1 Q. B. 621.
(2) (1887) 52 J. P. 70; 57 L. T. 491.
(3) (1889) 22 Q. B. D. 625.
(4) (1876) 1 Ex. D. 188.
(5) (1884) 13 Q. B. D. 586.
(6) (1895) 65 L. J. (M.C.) 12.

H. L. (E.) 1897 BOULTER v. KENT JUSTICES.

to renew is a determination of the lis, or an order exactly as the refusal of an order at judge's chambers is an order. Under s. 27 of the statute of 1828 the magistrates act judicially in determining whether the licence ought to be granted, and administratively in granting or refusing. The Act of 1884 and the Interpretation Act 1889 expressly include as within summary jurisdiction all acts of justices except such acts as reading the Riot Act, which is a preliminary to jurisdiction. All that is required is that the justices must be acting as a Court in summarily disposing of matters with which they deal under statutory powers. The court is not the less one of summary jurisdiction because some of its powers cannot be exercised summarily: see s. 27 sub-s. 1 of the Act of 1879; see also s. 20 and ss. 4 and 6 of the Act of 1884. The decision of the Court of Appeal in *Reg.* v. *Justices of Glamorganshire* (1) is perfectly sound and the reasoning of Fry L.J. (2) convincing. The definition in the Interpretation Act is, he says, exhaustive: "The effect seems to be that a 'court of summary jurisdiction' means a justice or justices of the peace acting as such." At the end of his judgment he observes that the result of the legislation is "not that the Acts of 1884 and 1889 in substance make justices acting as such in all cases courts, but that they put them in the same position as courts of summary jurisdiction for the purpose of certain provisions as to procedure." But in licensing the justices do act as a court. There is nothing in the statutes to justify the addition of the words "upon information or complaint." The Acts were intended to create uniformity of procedure. The application for renewal was fought like an action. In *Reg.* v. *Farquhar* (3) Blackburn J. points out that by s. 42 of the Licensing Act 1872 some days' notice of objection must be given, that the justices may adjourn the meeting, but must require the presence of the licence-holder on the day appointed. The justices have no power to object: *Reg.* v. *Justices of Anglesea.* (4) In this case the appellant contested the application as a party and was represented by his advocate, and there

(1) [1892] 1 Q. B. 621.
(2) [1892] 2 Q. B. at pp. 629–631.
(3) (1874) L. R. 9 Q. B. 258, 261.
(4) 65 L. J. (M.C.) 12.

is nothing in the Acts to take away the liability incident to litigation of paying costs.

Avory replied.

The House took time for consideration.

July 26. LORD HALSBURY L.C. My Lords, I believe this case may be compendiously stated as raising the question whether justices at a licensing meeting are a court of summary jurisdiction, and I am of opinion they are not.

I do not think they are a court at all. The whole licensing system has been conducted under a code of its own, and the Act of 1828 has provided a variety of provisions, and has constituted a form of procedure which does not appear to me primarily to come under the description of a court. It is true that justices are selected as the persons who are to exercise the jurisdiction, whatever that jurisdiction is; and, indeed, the Act of 1828 appears to have been thought by its authors to require an interpretation clause of its own, and, as it says, "to remove doubts as to the meaning of certain words in the Act"—among other things, to define that the word "justice" should be deemed to mean a justice of the peace.

I think in the whole course of legislation the distinction between a court and something which is not a court has been preserved.

In the 4th section of that Act the words used are "licensing meeting." By s. 9, when at any of the meetings aforesaid any question touching the granting, withholding, or transferring any licence shall arise, such question shall be determined by the majority of justices who shall be present when such question shall arise, and every licence granted under the authority of the Act is to be signed by the majority of the justices present when such licence shall be granted. It will be observed that not an order of Court, but merely the signature of the majority of the justices, is required.

Sect. 21 draws a remarkable distinction between the licensing justices acting in their capacity as a licensing authority and persons acting as a court. A person charged with offences

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Halsbury L.C.

against the licensing laws can be summoned to the general annual licensing *meeting* to answer the charge. The justices at the general annual licensing meeting may bind the person to answer the charge, and others to give evidence upon the charge. But in certain events an offender is required to be tried by a *court* of quarter sessions. The difference between the procedure of a court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal they may, and constantly do, receive representations not on oath. Their meetings must be public, it is true; but Lord Kenyon, who in 1790 (*Rex* v. *Downes* (1)) held a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added, that the construction of the then statute law was advantageous to the public because it was "of importance to the public that licences of this sort should be granted openly, and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness."

And Ashhurst J. says (2): "Though perhaps it was not necessary that such magistrates should be limited to the time mentioned in the Act for granting licences, yet, as the public are so much interested in the subject, the Legislature thought it proper to include all places in the general provisions of the Act, so that in no place whatever can the justices grant a licence but at a public meeting."

The Acts referred to by the learned judges were repealed by the Act of 1828. But a careful distinction appears to me to always have been reserved between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices.

If the Licensing Acts are to be looked to it cannot be doubted that the order made in this case, condemning a person in costs because he had opposed a licence at a licensing meeting and

(1) 3 T. R. 560. (2) 3 T. R. 570.

given notice of his intention to do so, cannot be supported. But the question, in truth, turns upon whether the meeting which I have described as a meeting of the licensing justices was a court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879.

It appears to me that the Act of 1879 certainly never contemplated bringing within its provisions a meeting of justices under the licensing laws. A court of summary jurisdiction must, of course, be a court, and the words "summary jurisdiction" appear to me to refer to a procedure primarily, at all events, criminal, wherein the Court does not proceed on the finding of a grand jury or information by the Attorney-General, but has the power to deal with an offence without those provisions which the original constitution of this country enforced as a security for the subject against criminal procedure.

I think no difficulty could have arisen but for the language of the Summary Jurisdiction Act, 1884, which enacts that the previous definition of a court of summary jurisdiction was to include "such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his or their commission, or by the common law."

At first sight it would seem that these words would include everybody who is a justice of the peace "doing any act whatever which by law he was entitled to do" in the definition of a court of summary jurisdiction. But it is to be remembered that the definition of a court of summary jurisdiction was a "justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by or who is or are authorized to act under the Summary Jurisdiction Acts or any such Acts." The amended definition of the Act of 1884 must surely be read by the light of that which it is intended expressly by the later Act to explain, and no one could seriously contend that it would have been doubtful, before the Act of 1884, whether a licensing meeting was included in the definition as it then stood. The amendment is obviously pointed to the doubt whether, where by some Acts a particular proceeding is authorized, and a summary court is made the ultimate tribunal,

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Halsbury L.C.

the definition of 1879 was not too narrow when it limited the definition to magistrates who are authorized to act under the Summary Jurisdiction Acts, or any of such Acts. Undoubtedly jurisdiction was given to determine certain judicial cases, but the Acts could not have been properly described, in name or in substance, as Summary Jurisdiction Acts. But if I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition, and to make applicable to that definition, persons who were, in fact, justices of the peace, but who in the particular matter here referred to, namely, "licensing," were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on.

The distinction I am insisting on is only consistent with the language of the Summary Jurisdiction Act itself. Speaking of the appeal, the appeal is to be "from a conviction or order," words perfectly familiar to every person acquainted with the procedure of the courts in question, wholly inapplicable as it appears to me to the decision of justices at a licensing meeting.

If the appeal still exists under the Act of 1828, as I think it does, the appeal must be conducted under the provisions of that statute. I am aware that this view is in conflict with decision, but I am not able to concur in the decision arrived at in *Reg.* v. *Justices of Glamorganshire.* (1) It seems to me that neither popularly nor technically would a licensing meeting be a court of summary jurisdiction. To the lawyer as well as to the layman it would be an astonishing thing if at a licensing meeting the magistrates should proceed to hear and try a case, for example, in which a person was to be committed for trial, though if they are a court of summary jurisdiction they could enter on such an investigation. It would be said the whole proceedings of such a meeting are inapplicable to such a condition of things. Quite true. But the inapplicability to such a condition of things is, to my mind, ground for the conclusion

(1) [1892] 1 Q. B. 621.

at which I have arrived, that a licensing meeting never could have been intended to be included in the phrase "court of summary jurisdiction." It is what it purports to be—a licensing meeting; and inasmuch as the whole jurisdiction to make the order now under debate depends upon the supposed authority given to it as a court of summary jurisdiction, and as I am of opinion that it does not fill that character, the order is clearly bad.

I am, therefore, of opinion that the order appealed from ought to be reversed, and that the respondents do pay to the appellants their costs both here and below.

LORD WATSON. My Lords, I am of the same opinion with the Lord Chancellor, and I agree in the judgment which he has proposed.

I have had an opportunity of considering carefully the judgment which has been prepared by my noble and learned friend Lord Herschell, and I think it sufficient to say that I entirely concur both in the conclusions of the noble and learned Lord and in the reasons which he has assigned for them.

LORD HERSCHELL (after stating the facts). My Lords, there is no doubt that, prior to 1879, appeals from the refusal to grant a licence by way of renewal were regulated by the Licensing Act, 1828. By s. 27 of that Act any person thinking himself aggrieved by "any act of any justice, done in or concerning the execution of the act, may appeal against such act" to the next quarter sessions, provided he gives "to such justice" notice in writing of his intention to appeal within five days after the act shall have been done. It is clear that under the Act of 1828 the court of quarter sessions had no power to make an order for the payment of costs against a person who had opposed the grant of a licence at the licensing meeting.

It is contended, however, that the proceedings on an appeal to quarter sessions against the refusal to grant a licence by way of renewal are now regulated by s. 31 of the Summary Jurisdiction Act, 1879. If this be so, the jurisdiction of the Court to award costs is beyond question. It is conceded that the

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Herschell.

licensing justices are not, by virtue of the Summary Jurisdiction Act, 1879, standing alone, made a court of summary jurisdiction. The definition of a court of summary jurisdiction in s. 50 of that Act is: "Any justice or justices of the peace, or other magistrate by whatever name called, to whom jurisdiction is given by or who is or are authorized to act under the Summary Jurisdiction Acts or any of such Acts." But the Summary Jurisdiction Act, 1884, by s. 7, after reciting the 50th section of the prior Act, and that doubts had arisen whether the section extended to justices acting under some Act other than the Summary Jurisdiction Acts, enacted as follows: "It is hereby declared that the above-recited definition of court of summary jurisdiction includes such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." This section was repealed by, but is practically re-enacted in, the Interpretation Act, 1889.

It is said that the effect of the provision contained in the Act of 1884 was to make the licensing justices a court of summary jurisdiction. I quite agree that if the words are to be read without any restriction being imposed upon them by reason of the subject-matter of the legislation of which they form part, they apply to every justice when acting as such, and therefore to the licensing justices. I will, for the present, assume that this is their effect, though I shall have something to say on the point hereafter.

It is said next, that the licensing justices, being a court of summary jurisdiction, an appeal from them to quarter sessions is regulated by and is subject to the provisions of s. 31 of the Act of 1879. This was held to be the law by the Court of Appeal in the case of *Reg.* v. *Justices of Glamorganshire* (1), and again in the present case. The question arose in the former case in this way: the appellant had given notice of his intention to appeal to the clerk and to some only of the licensing justices, which would not be sufficient under the Act of 1828, whereas a notice to the clerk alone was sufficient if

(1) [1892] 1 Q. B. 621.

the Act of 1879 applied. The Court of Appeal held, affirming the Queen's Bench Division, that the notice was sufficient.

It is remarkable that neither in the judgments in *Reg.* v. *Justices of Glamorganshire* (1), nor in those delivered in the present case, is any reference made to the introductory language of s. 31 of the Act of 1879, which limits the operation of that section to persons entitled to appeal from the "conviction or order" of a court of summary jurisdiction. It seems to have been assumed by the learned judges that if the licensing justices were a court of summary jurisdiction, it necessarily followed that all appeals from their decisions came within the terms of and were regulated by the provisions of s. 31. I do not think this is so.

An applicant to whom a licence is refused has undoubtedly by the Act of 1828 a right to appeal, for that statute confers on him a right to appeal from "any act" of the licensing justices. But can it be said that he is thereby authorized to appeal from a "conviction or order"? The appeal authorized is certainly not one from a "conviction": is it an appeal from an "order"? Even if I had to construe the language of the introductory part of clause 31 alone, without the light thrown upon it by the subsequent provisions, my answer must be in the negative.

Sect. 31 forms part of an Act to amend the law relating to the summary jurisdiction of magistrates. What is meant by the summary jurisdiction of magistrates is, of course, perfectly well understood by every lawyer, and in relation to that jurisdiction the words "conviction" and "order" have a well-defined meaning. The conviction follows on an information, the order on a complaint. When the licensing justices grant an application for a licence they sign a certificate by means of which the licence is obtained. But where they refuse the application they make no order at all. They simply do not grant the licence applied for. An order is never drawn up, and to speak of the act of the justices in not granting a licence as an order would be, I think, a misuse of the term. When the other provisions of s. 31 are examined the matter becomes

(1) [1892] 1 Q. B. 621.

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Herschell.

even clearer. The first sub-section prescribes that the appeal must be made to the next quarter sessions holden not less than fifteen days "after the day on which the decision was given upon which the conviction or order was founded," thus showing that the words "conviction or order" are not even used as meaning the decision that a conviction shall take place or an order be made, but refer to the conviction and order themselves, in their technical sense. The refusal to grant a licence may be regarded as a decision of the licensing justices; but what is the "order" founded thereon? The 6th sub-section, to my mind, puts the matter beyond doubt. No allusion was made in any of the judgments either to this sub-section or to that from which I have just quoted. The 6th sub-section requires that whenever a decision is not confirmed by the Court of Appeal, the clerk of the peace "shall indorse on the conviction or order appealed against a memorandum of the decision of the Court of Appeal." It is to be observed that the sub-section imposes the duty in all cases: the word is "whenever." How is it possible for this duty to be performed in cases like that under consideration, where no order is ever in existence?

That the word "order" is used in its technical sense and not in a loose fashion to cover every decision of magistrates is shewn by another provision to be found in the Act. The 33rd section enacts that any person aggrieved who desires to question "a conviction, order, determination or other proceeding" of a court of summary jurisdiction, on the ground that it is erroneous in point of law, may require a case to be stated. The words "determination or other proceeding" are here added, indicating that every determination of justices was not regarded as comprised in the word "order."

I have not yet referred to the 2nd sub-section of s. 31, which was much discussed in the argument at the Bar. That sub-section prescribes that the appellant shall give notice of appeal to "the other party." There is no difficulty in applying this provision in cases where magistrates exercise summary jurisdiction as commonly understood. Where proceedings are taken by way of information or complaint, which end or may end in a conviction or order, there are always two parties—the

person initiating the proceedings, and the person against whom the proceedings are taken. It has been held that, where the appeal is against the refusal to grant a licence, a person who has objected to the grant of the licence before the licensing justices is "the other party" within the meaning of s. 31. No doubt, if it be assumed that the section includes such a case, the words "the other party" could not very well apply to any one else. But, to me, the provision for notice to the other party is an additional reason for thinking s. 31 inapplicable to appeals against the refusal of justices to grant a licence. Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one inter partes at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the Court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all then become "the other party"? There is, in truth, no lis, no controversy inter partes, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in s. 2 seems then to me an additional reason for holding that an appeal from the "act" of the justices in refusing a licence is not an appeal from a "conviction or order" of a court of summary jurisdiction.

I see no inconvenience in such a conclusion; quite the

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Herschell.

reverse. It is said that the object of s. 31 was to introduce uniformity of procedure in appeals to quarter sessions. A laudable object, and calculated to be useful when applied to a class of cases similar in their character. But there does not appear to me to be any reason for straining the language of s. 31, so as to make it embrace a very different class of cases provided for by special legislation. That legislation has never been expressly repealed, and I do not think it has been repealed by necessary implication, for an enactment which regulates appeals against a "conviction or order" of a court of summary jurisdiction does not, in my opinion, conflict with an enactment which prescribes the method and conditions of an appeal against "any act" of the licensing justices.

The Court of Appeal arrived at the conclusion they did in the *Glamorganshire Case* (1) and in the present case because they felt bound to attribute to the words of the definition clause their natural meaning. I have been guided by the same principle in interpreting the language of s. 31 of the Act of 1879, which seems to me to have been somewhat lost sight of.

Although the views I have expressed involve the decision that *Reg.* v. *Justices of Glamorganshire* (1) was wrongly decided, they do not necessarily conflict with the judgment in the case of *Reg.* v. *Justices of Pontypool* (1), in which it was held that the licensing justices were bound under s. 33 of the Act of 1879 to state a case for the opinion of the Court. That section, as I have already pointed out, entitles an aggrieved party who desires to question any "determination" of a court of summary jurisdiction as erroneous in point of law to have a case stated. And a decision not to grant a licence is undoubtedly a "determination" of such court if the licensing justices are a court of summary jurisdiction.

Though it is not necessary to decide the point, I feel bound to say that, as at present advised, I am not satisfied that the conclusion arrived at on this point in the Courts below is a sound one. Looking at the scope of the Act of 1879, at the fact that the 7th section of the Act of 1884 purports to be declaratory and not enacting, and that it is difficult to suppose

(1) [1892] 1 Q. B. 621.

that it was intended to enact that every justice when doing any act under any authority which he possesses is a court of summary jurisdiction, I think that the enactments defining a court of summary jurisdiction may well be construed, and ought to be construed, as meaning no more than this—that every justice is a court of summary jurisdiction within the meaning of the Act of 1879, or any other law relating to summary jurisdiction, in all matters pertaining to the exercise of summary jurisdiction by magistrates, however he may have derived his authority to exercise that jurisdiction.

I think the judgment should be reversed, and the appeal allowed with costs, here and below.

LORD SHAND. My Lords, I also am of opinion that the judgment should be reversed, and I have nothing to add to the grounds of judgment which have been already stated by my noble and learned friends, in which grounds of judgment I entirely concur.

LORD DAVEY. My Lords, in this case the Court of Appeal, in deciding adversely to the present appellant, have followed a previous decision of their own in *Reg.* v. *Justices of Glamorganshire*. (1) The question in the earlier case was whether a notice of appeal against a refusal to renew a licence which had been served in the manner provided by the Summary Jurisdiction Acts, but did not comply with the requirements of the Licensing Acts, was sufficient. It was therefore in substance the same question as is involved in the present case. The Court of Appeal held that the question was concluded by the terms of the definition of "court of summary jurisdiction" contained in s. 13, sub-s. 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63). The Master of the Rolls held that the provisions of the Summary Jurisdiction Acts as to procedure are intended to apply to all acts of justices where they are acting as justices in any matter in which an appeal may lie. Fry L.J. agreed, but added these words: "I desire to observe that what we are holding is, not that the Acts of 1884 and

(1) [1892] 1 Q. B. 621.

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Davey.

1889, in substance, make justices acting as such in all cases courts, but only that they put them in the same position as courts of summary jurisdiction for the purpose of certain provisions as to procedure."

It must be admitted, my Lords, that the words of s. 13, sub-s. 11, of the Act of 1889 are very wide and are capable of the meaning attributed to them by the Court of Appeal. In order to ascertain whether they bear that meaning or a more restricted meaning, one must look to the scope and purpose of the Act, the subject-matter of the enactment itself, and the context in which they are used. By s. 50 of the Summary Jurisdiction Act, 1879, a court of summary jurisdiction was defined as "any justice or justices of the peace or other magistrate by whatever name called to whom jurisdiction is given by, or who is or are authorized to act under, the Summary Jurisdiction Acts or any of such Acts." There were, however, a great many Acts by which justices were authorized to deal with certain specified matters in a summary way, and in most of which a mode of procedure was prescribed. Doubts appear to have been entertained whether the section applied to such cases, and it was considered desirable to assimilate the procedure in all cases of summary jurisdiction. Accordingly, by the Summary Jurisdiction Act of 1884, a large number of earlier enactments enumerated in the schedule laying down a special procedure were repealed, and by s. 7, after reciting s. 50 of the Act of 1879, and reciting that doubts had arisen as to whether the said section extended to such justice, justices, or magistrate, when acting under some Act other than the Summary Jurisdiction Acts, and it was expedient to remove such doubts, it was declared that the above-recited definition of "court of summary jurisdiction" in s. 50 of the Act of 1879 includes "such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." It is to be observed that the schedule of enactments repealed contains the provisions as to procedure of the sections of the Licensing Act 1872 dealing with the recovery of penalties for the infringe-

ment of the provisions of that Act, but does not include the sections in the 9 Geo. 4 and the Act of 1872 relating to procedure on the grant or renewal of licences or appeals from the justices in such cases. It is obvious that the word "acting" may mean acting generally and in any capacity, or acting in the particular manner or capacity in question, namely, in exercise of summary jurisdiction. My Lords, I am of opinion, on consideration of the context and the connection in which the word "acting" is used, that it should be read in the more restricted sense, and that it means in this section "exercising summary jurisdiction," and consequently that the section does not according to its true construction apply to justices except when sitting as a court and exercising summary jurisdiction. In other words, the only effect of the section is to apply the procedure of the Summary Jurisdiction Acts to the justices exercising summary jurisdiction, whether that jurisdiction was derived from the Acts themselves or from some other source. It did not therefore, in my opinion, alter or affect the procedure laid down by the Act of Geo. 4 for appeals from the act of justices concerning the granting or renewal of licences.

I now come to the Act of 1889. Its title is "An Act for consolidating enactments relating to the construction of Acts of Parliament, and for further shortening the language used in Acts of Parliament." A most laudable object assuredly; but an Act for that purpose is the last place in which you would look for a substantive and important change in the law—imposing new liabilities on Her Majesty's subjects. Sect. 50 of the Act of 1879 and s. 7 of the Act of 1884 are repealed, and for them is substituted the sub-section in question, which appears to be compounded out of the two repealed sections. I regard this section as being what it purports to be—a consolidation of the then existing law, and as not intended to extend or alter that law. I think that the words used in it must be interpreted in the same sense as that in which they are used in the repealed sections, and consequently that according to the true construction of the section it applies only to justices when exercising summary jurisdiction whether under the Summary Jurisdiction Acts or any other authority. Agreeing with Fry L.J. that it

H. L. (E.) 1897 BOULTER v. KENT JUSTICES. Lord Davey.

does not make justices in all cases a court of summary jurisdiction, I think, differing from that learned judge, that it does not either have the effect of putting them in the same position for purposes of procedure.

I do not dissent from what was said by Wright J. in giving judgment in the present case: "It is incredible that any lawyer," or (I will add) the Legislature, "should have meant to apply in that wholesale and rough and ready way the provisions of the Summary Jurisdiction Acts to matters to which they had never been adapted and were not at all applicable." For the reasons I have given I do not think the Legislature has done so.

I also agree that the refusal of the justices to renew the licence was not an "order or conviction" within the meaning of the Summary Jurisdiction Acts; but I so entirely agree with what has been said by my noble and learned friend opposite (Lord Herschell) on that subject that I need not repeat the reasons for my opinion.

I therefore concur in the order which has been proposed.

Order of the Court of Appeal and order of the Queen's Bench Division reversed with costs here and below, to be paid by the respondents other than the justices: cause remitted to the Queen's Bench Division.

Lords' Journals, July 26, 1897.

Solicitors for appellants: *Hicks, Davis & Hunt, for A. M. Bradley, Dover.*

Solicitors for respondents: *Godden, Son & Holme, for Mowll & Mowll, Dover.*

[HOUSE OF LORDS.]

GOSLING . . . . . APPELLANT; H. L. (E.) 1897 July 27.

AND

GASKELL AND GROCOTT . . . . . RESPONDENTS.

Company—Debentures—Trustees for Debenture-holders—Receiver—Principal and Agent—Liability for Goods ordered by Receiver.

A limited company mortgaged all its assets to trustees for debenture-holders to secure payment of the debentures, and by the deed it was provided that the trustees might in writing appoint a receiver who should carry on the business of the company, and that any receiver so appointed should be the agent of the company who alone should be liable for his acts and defaults. The trustees appointed a receiver under the deed and he took possession of the assets and carried on the business of the company. Soon after his appointment the company was ordered to be compulsorily wound up. The receiver continued to carry on the business and in so doing ordered goods from the respondents. In an action against the trustees for the price of the goods :—

Held, reversing the decision of the Court of Appeal, [1896] 1 Q. B. 669, that though after the winding-up order the receiver ceased to be the agent of the company, he did not thereby or at any time receive any implied authority from the trustees to act as their agent, and that as the trustees never gave him any authority in fact they were not liable for the goods.

THE following statement of facts is taken from the judgment of Lord Watson :—

The present appellant and the deceased William Cunliffe Gosling were trustees under an indenture of mortgage, executed upon May 18, 1892, by Poole & White, Limited, for the security of their second debenture-holders. The company had borrowed the sum of 11,000*l.* upon three series of debentures, the first issue being for 7000*l.*, the second for 3000*l.*, and the third for 1000*l.*, which were charged upon the whole assets of the company, present and future, with the exception of its uncalled capital.

By the deed of May 18, 1892, the company mortgaged these assets to the trustees, with certain powers, of which two only need be referred to for the purposes of this case. By the first of these, the trustees, in the event of the security becoming

H. L. (E.) 1897 GOSLING v. GASKELL.

enforceable in the sense defined by the deed, were empowered to enter into possession of and realize the subjects mortgaged, accounting for the proceeds realized to the debenture-holders, and to the company for any surplus which might remain after satisfying their debt. By the second, although the security should not have become enforceable in terms of the deed, the trustees were authorized, upon their certifying that, in their opinion, it was endangered, to appoint a receiver who was to enter into possession of the assets mortgaged, and to carry on the business of the company. It was made an express condition of the exercise of that power that "any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults." No power was conferred upon the trustees, in any event, to conduct the business themselves.

On July 22, 1892, the trustees certified, by a writing under their hand, that in their opinion the security was endangered; and by the same writing they appointed William John Kelly to be receiver of all and singular the property and rights mortgaged, with all the powers conferred by the indenture, whether expressly or by implication. A proviso was added which does not occur in the indenture, to the effect that the receiver should open an account with a bank, in which the trustees had a partnership interest, into which all moneys received by him were to be paid on the day of their receipt; and also that the bank should not honour any cheques drawn by him on that account, unless they were countersigned by John Tryon. Mr. Tryon was a member of a firm of solicitors who acted for the trustees in these transactions between them and Poole & White, Limited. He was also the chairman of that company, and the holder of its third issue of debentures.

The company accepted and gave immediate effect to the appointment of the trustees by putting Mr. Kelly into possession of its assets, and transferring to him the conduct of its business. From that time until February, 1895, Mr. Kelly continued to carry on the business as the "receiver of Poole & White, Limited."

On September 1, 1892, a petition was presented to the High

Court of Justice for the winding-up of Poole & White, Limited; and, on the 14th of that month, the Court ordered that the company should be wound up by the Court under the provisions of the Companies Acts. The official receiver became liquidator of the company, and subsequently Mr. Wilding was appointed liquidator in his place. Neither the liquidator nor the first debenture-holders interfered in any way with Mr. Kelly's management of the company's business, which went on after the liquidation order in precisely the same manner as it had done before, with this single variation, that in September, 1893, the counter-signature of Mr. Tryon was dispensed with, and the bank thereafter honoured cheques drawn by the receiver upon his account.

This action was brought by the respondents against both trustees under the indenture of May 18, 1892, one of whom, the late William Cunliffe Gosling, died before service of the writ, for the sum of 488*l.* 9*s.* 3*d.*, being the balance still unpaid of the price of goods supplied at various times to Mr. Kelly in his capacity of receiver for Poole & White, Limited, between December 5, 1893, and January 31, 1895. They have obtained judgment against the appellant for that amount with costs, before the Lord Chief Justice of England, sitting without a jury, whose decision was affirmed by a majority of the Appeal Court consisting of the Master of the Rolls and Lopes L.J., Rigby L.J. dissenting. (1)

May 6, 7. *Jelf Q.C.* and *W. F. Hamilton* for the appellant. There was no relation of principal and agent between the trustees and the receiver. Until the liquidation the company were principals, and the Courts below proceeded on the erroneous doctrine that as after that date the company could not in law be principals, there must be principals, who could be none other than the trustees for whose benefit the goods were ordered. But *Collen* v. *Wright* (2) shews that the mere fact that one person ceases to be a principal cannot make others principals. The result may be to attach the liability of principal to the agent himself: see the observations of Lord

(1) [1896] 1 Q. B. 669. (2) (1857) 8 E. & B. 647.

H. L. (E.) 1897 GOSLING v. GASKELL.

Herschell in *Salomon* v. *Salomon & Co.* (1) The appellant and his co-trustee had no power to appoint a receiver as their agent, and if the company had not gone into liquidation they might have repudiated Kelly's contracts. After the liquidation the receiver appointed by the trustees acquired the same position as a receiver appointed by the Court.

The true view is expressed in Rigby L.J.'s judgment. See also *Cox* v. *Hickman* (2), and the observations of Lord Cranworth (3), and the judgment of Lord Wensleydale, and *Mollwo, March & Co.* v. *Court of Wards.* (4) Where a receiver has been appointed at the instance of debenture-holders he has always been considered as the agent of the company who are owners of the equity of redemption. It was for the company's benefit that the business was carried on, and if there had been profits, they would have been the company's profits. Even after the liquidation a company is entitled to accounts from the receiver. The ordinary law of mortgage applies to such a case as the present. The receiver is the agent of the mortgagor, and is in the position of a person appointed by a deed to which the mortgagee is not a party: *Jefferys* v. *Dickson* (5); Davidson's Conveyancing, 4th ed. vol. ii. pt. ii. p. 90.

Herbert Reed Q.C. and *E. W. Hansell* (*Gregson* with them) for the respondents. The receiver did not carry on the business as a principal, but as agent for the appellant and W. C. Gosling as undisclosed principals. The trustees had power under the deed to take possession and carry on the business. After the liquidation the company had no power to authorize the receiver to carry on the business; although before the liquidation they might have been responsible for the price of goods ordered by the receiver. By the deed all moneys received were to be applied in keeping down the interest on the debentures. The receiver was the appellant's agent—appointed by the trustees and continued in office by them although they had power to dismiss him. He was required to pay all moneys received into the bank in which the trustees were partners,

(1) [1897] A. C. 22, 42.
(2) (1860) 8 H. L. C. 268.
(3) 8 H. L. C. 306.
(4) (1872) L. R. 4 P. C. 419.
(5) (1866) L. R. 1 Ch. 183, 190.

and he could not draw any cheques which were not countersigned by the appellant's solicitor, who was also chairman of the company. As it was never contemplated that he should be a principal, on ceasing to be agent for the company on the liquidation, he became the appellant's agent. In the words of Lord Esher M.R. in *Owen* v. *Cronk* (1), he received the money "for his masters," the trustees, to whom it was his duty to pay it over at once. The trustees having power to take possession, the property after the liquidation was no longer that of the company: see per Cotton L.J. in *In re Henry Pound, Son & Hutchins.* (2) The powers of the Court in a liquidation are limited, and do not extend, for example, to sanction a contract by the liquidator for reconstruction: *In re Wreck Recovery and Salvage Co.* (3) The receiver was the creature of the trustees, who had power to remove him, and they must be accountable for his actions.

Hamilton in reply referred to *Redpath* v *Wigg* (4)

The House took time for consideration.

July 27. LORD HALSBURY L.C. My Lords, I am of opinion that this case is covered by authority. The case of *Cox* v. *Hickman* (5) in this House appears to me expressly in point. Before that case was decided, I could have well understood the arguments presented to your Lordships on this appeal on the part of the respondents; but it appears to me to be too late to take up the position, which was then very plausibly occupied.

The facts in this case are complicated to some extent by one of the parties being a company; but in truth there is nothing in that circumstance which can alter the application of the law. A company called Poole & White, Limited, had borrowed a large sum of money upon a mortgage of the whole property of the company to certain trustees, who, among other powers given to them, were entitled to enter into possession of the property mortgaged for the purpose of paying to certain debenture-holders the loan, and handing over to the company

(1) [1895] 1 Q. B. 265, 272.
(2) (1889) 42 Ch. D. 402, 421.
(3) (1880) 15 Ch. D. 353.
(4) (1866) L. R. 1 Ex. 335.
(5) 8 H. L. C. 268.

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Halsbury L.C.

whatever should remain after the debt and the sums due upon debentures had been paid. In certain events, which happened, the trustees in pursuance of this power entered into possession, and in pursuance of the same power appointed a receiver to take possession of the property and to carry on the business of the company.

Some months after the date of the mortgage a Mr. Kelly, the receiver so appointed, was put into possession of the property mortgaged, and for a period of between two and three years carried on the business of the company. If during the period of so carrying on the business of the company Mr. Kelly or the trustees had been personally sued, the exact question which arose in *Cox* v. *Hickman* (1) would have arisen, and though I shall proceed to discuss what happened afterwards, I believe the statement might stop there so far as the decision of the present case is concerned.

It is the fact that Mr. Kelly, on behalf of the trustees, ordered goods and incurred liabilities on behalf of some one in the conduct of the business, and I could well understand that but for *Cox* v. *Hickman* (1) it might very reasonably have been argued that the trustees here, like the creditors and their agent there, were carrying on a business for their own profit; and the agency, such as it was, might well have been held to bind the persons entering into these trading operations as partners in the business. As Blackburn J. in that case said, it was very reasonable that those sought to be charged in *Cox* v. *Hickman* (1) had authorized the managers of the business that was being carried on to bind them, as it was "an incident attached by law to a participation in the profits that such authority is given to those managing the concern."

What Lord Cranworth says seems to me to be the answer to the argument in that case, as it is the answer to the argument here. His Lordship says: "It seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees.

(1) 8 H. L. C. 268.

The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution; but the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on."

This is the principle, and I am wholly unable to distinguish the reasoning of the noble and learned Lord from the propositions of law that are applicable to this case. After the period of Mr. Kelly's management an order was made for winding up the company under the provisions of the Companies Acts, and no difference was made in the management of the business, or in the mode in which it was carried on, after that order was made.

For some reason or another which I have not been able to follow, it is apparently assumed that immediately on the winding-up order, Mr. Kelly, who it is assumed had been up to that time the agent for the company (as indeed he was so described, and as by the terms of the mortgage deed he was bound to be), suddenly became the agent of the trustees. That no new authority was in fact given to Mr. Kelly is admitted, but why the making of the order to wind up the company should suddenly convert Mr. Kelly, who was there as the agent of the company, into the agent of the trustees is a problem that I have not been able to solve.

There is a circumstance which appears to me to be absolutely irrelevant, but which, as it is relied on, it is proper to notice, namely, that one of the conditions on which the security should become enforceable, and under which it was enforced, was that, if in the opinion of the trustees the security should become endangered, they the trustees should appoint a receiver, and that when they had appointed a receiver that receiver was to open an account with the bank in which the trustees themselves

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Halsbury L.C.

were partners, and all moneys received by the receiver appointed must immediately be paid into that bank, and when cheques were drawn by him on the account so created, a Mr. Tryon, the solicitor for the trustees, was to countersign the cheques. Mr. Tryon was chairman of the company. As I have said, this fact is irrelevant. The fact of the trustees keeping a check upon the mode in which the produce of the trade carried on was dealt with (which was all that was done by this provision) appears to me to reflect no light whatever on the relation of the trustees to outside creditors, who were supplying goods to the receiver of Poole & White, Limited.

As I have pointed out before, but for *Cox* v. *Hickman* (1) it might well have been argued that the trustees, though called trustees in the deed, were really managers, and, as far as the management of the concern went, the mere agents of the creditors, who had the entire control over them, and as Crompton J. (in *Cox* v. *Hickman* (2)) actually asked: "In what then does the present case differ from that of ten persons setting up a new business in the names of two or three managers, they having to divide all the profits? The present case, indeed, is not even one of a trading in the names of the managers, but in a name which may comprehend any partners, and the clause of the deed so much relied on by the plaintiffs in error, which stipulates that they shall carry it on in the name of the Stanton Iron Company, must surely be quite inoperative as to any limitation of the liability to such persons when the rule of law is so well recognised that no agreement amongst partners can prevent the liability to third persons arising from the participation of profits. I can see no hardship under this particular deed in the creditors, who are to have the profits, being liable for the funds and goods from which the profits are to be made, except the general hardship of large liability from small investments, attempted to be remedied by the Limited Liability Acts."

The answer is one which I have already quoted from Lord Cranworth, and, if I were to substitute the word "company" for the word "debtor" in Lord Cranworth's language, every

(1) 8 H. L. C. 268. (2) 8 H. L. C. at p. 291.

word of that very learned judge's observations would be applicable in this case. The company is still the person solely interested in the profits, save only that it has mortgaged them to its creditors. It receives the benefit of the profits as they accrue, though it has precluded itself from applying them to any other purpose than the discharge of its debts. The trade is not carried on by, or on account of, the creditors, though their consent is necessary in such a case, but the trade still remains the trade of the company. The company is the person by, or on whose behalf, the business is carried on.

I am not able to understand in what way the winding-up order is supposed to have affected the persons now sued. I am not aware that there is anything in proof which shews that they accepted any other liability than that which they had already incurred, whatever that liability was. No specific act of adoption of any order given subsequently to the winding-up is even suggested. If the agent was acting under a misapprehension that he still could have the authority of the company to carry on the trade, it would not make those who originally appointed him in pursuance of the powers of the deed liable for his acts. They appointed him, as they were entitled to appoint him, under the express powers of the deed, and if the argument addressed to your Lordships were to prevail, that the authority of the company can no longer be invoked to sanction the trading, inasmuch as his power to trade with the company had ceased with the winding-up order, it could not operate to involve the trustees in a new liability without their knowledge. It could not be said that they were the real proprietors of the business even if, as two of the learned judges say, the company had ceased to exist. It was not, and it never could be, their business. Anything that their authorized trading had procured in the way of profit would not have belonged to them; but even if unauthorized, it was carried on ostensibly for and on behalf of the company, and if they neither professed to be the principals, nor were in fact the principals, I do not understand how they can be made principals.

Under the circumstances, I am of opinion that the judgments of the Courts below were wrong, and I think this appeal ought

H. L. (E.) 1897 GOSLING v. GASKELL.

to be allowed, and the respondents ought to be made to pay the costs both here and below.

LORD WATSON (after stating the facts). My Lords, it is no part of the respondents' case, and it was not maintained by their counsel at your Lordships' Bar, that the appellant and his co-trustee were either real or ostensible partners of the concern carried on by Mr. Kelly as receiver of Poole & White, Limited. Their sole contention, which succeeded in both Courts below, was, that the relations established between them and the receiver whom they appointed, professedly under the power conferred upon them by the indenture, were such that they must, in law, be held, if not before at least after the liquidation order, to have given authority to Mr. Kelly to purchase goods for the purpose of carrying on the business; and that, the purchase of the goods in question having been within the scope of that authority, the appellant and his co-trustee were conjointly and severally responsible for their price. In view of that argument, it appears to me to be expedient to consider separately the legal position of the trustees before and after the liquidation of the company, especially seeing that their liability during those two periods was rested upon different considerations. If, before the order, the trustees had given the receiver authority to pledge their credit, cadit quæstio. If they had not, the question still remains whether they subsequently gave him such authority. Neither of these questions involves any controversy of fact. Every fact in the case, whether relevant or not, has been made matter of mutual admission; and, to my apprehension, the only matter which your Lordships have to determine is whether the admitted facts are in law sufficient to sustain the inference that such authority was given.

I think it would be impossible to affirm that any liability attached to the trustees during the earlier of these periods unless your Lordships were prepared to ignore or reverse the doctrine approved and applied by this House in *Cox* v. *Hickman* (1), and followed by the Judicial Committee of the Privy

(1) 8 H. L. C. 268.

Council in *Mollwo, March & Co.* v. *Court of Wards.* (1) In *Cox* v. *Hickman* (2), a firm of ironmasters trading as B. Smith & Son, being unable to meet their obligations, entered into a deed of arrangement with their creditors, by which the whole business of the firm was assigned to certain of the creditors as trustees, to be carried on by them under the name of "The Stanton Iron Company." Provision was made for meetings of the creditors, at which the majority in value present were to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. The purposes of the trust were to distribute the net income of the business rateably among the creditors of the firm, which net income was always to be deemed the property of the firm of B. Smith & Son, for whom the trustees were to hold the trust estates when all the debts were paid. The trustees, in the course of their management, bought goods of Hickman, and accepted bills to him for the price "per proc. the Stanton Iron Company." The object of the action was to make two of the creditors, who were parties to the deed of arrangement but were not trustees, personally liable for the amount of these bills. The learned judges of the Court of Exchequer Chamber, and also the judges who attended the House, were equally divided in opinion; but the four noble and learned Lords who constituted the House were unanimous in holding that these creditors were not made partners of the Stanton Iron Company by the provisions of the deed of arrangement; and that there were no grounds for inferring that they had given authority to the trustees to pledge their credit for goods purchased in the course of carrying on the business. In the present case the business was carried on by a receiver, who was, until it went into liquidation, the agent of the company; and the trustees upon whom it is now sought to impose liability, who had no power either to conduct the business or to control the receiver in its management, never attempted to do either the one or the other of these things.

I have had difficulty in speculating upon what principle the Lord Chief Justice, who makes no reference to *Cox* v.

(1) L. R. 4 P. C. 419. (2) 8 H. L. C. 268.

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Watson.

Hickman (1), arrived at the conclusion that, consistently with the principle of that decision, the appellant could be held to have given authority to Mr. Kelly to pledge his credit to the respondents. Unfortunately, his Lordship, after expressing an opinion to that effect, indicates that he did not consider it necessary to give his reasons, probably because he was also of opinion that the appellant had, at all events, given such authority at the time when the goods the price of which is in question were purchased by the receiver.

In the Court of Appeal, Lord Esher took the same view in regard to the liability of the appellant before the liquidation, and has assigned his reasons. His Lordship regarded the proviso inserted in Mr. Kelly's appointment, requiring him to open a bank account, and to make daily payment into it of the receipts of the business, and also that his cheques should be countersigned by Mr. Tryon, as introducing conditions which not only were in excess of the power of appointment conferred upon the trustees by the indenture of May 18, 1892, but conditions which gave the trustees control over the management of the receiver. I am unable to assent to either of these propositions. Both conditions appear to me to have been reasonable checks imposed upon the agent of the company, for whose acts and defaults the company alone was liable, in the interest of the company itself. Then, as to the power of controlling the management of the receiver, which the trustees are supposed to have derived from the fact that Mr. Tryon was selected to countersign his cheques, Lord Esher observed (2) that the receiver ought not to have been put in the position of ordering goods, "and then having to say to the tradesmen who supplied them that he could not pay for them because those who appointed him had reserved control over all such payments themselves." That reasoning ignores the fact that Mr. Tryon was not only solicitor for the trustees but chairman of the company and holder of the third issue of debentures, and that in both these capacities he had a material interest in the success of the business carried on by the receiver, and therefore an interest in seeing that its receipts were properly applied in

(1) 8 H. L. C. 268. (2) [1896] 1 Q. B. 680.

extinction of its current liabilities. He had no right whatever to refuse to countersign cheques drawn in payment of goods actually purchased: his only function was to satisfy himself, before countersigning, that the cheque represented a real transaction by the receiver. It must also be kept in view that the company acquiesced in the terms of the appointment as made by the trustees, and on that footing transferred its assets and the conduct of its business to Mr. Kelly; and that circumstance, in my opinion, affords a conclusive answer to the suggestion that the addition of these provisoes, which constituted a mere check to prevent any improper application of the receipts of the business, and gave neither Mr. Tryon nor anyone else power to control the course of its management by the receiver, was in excess of the power to appoint him conferred by the company upon the trustees for the second debenture-holders. The provisoes must, in these circumstances, be treated on the same footing as if they had been expressed at length in the indenture of May 18, 1892.

The Lord Chief Justice, the Master of the Rolls, and also Lopes L.J., who held that the appellant would not have been liable for goods bought by the receiver before the liquidation order, were all of opinion that, whether the trustees were or were not responsible for the receiver's purchases before that event, they became so liable upon its occurrence. I am unable to follow the reasoning by which these learned judges have arrived at that result. The Lord Chief Justice says that the company quâ company then "ceased to have any real actual existence at all as a going or trading concern," and that the liquidator took no part, direct or indirect, in the carrying on of its business by Mr. Kelly. Lopes L.J. says (1) that "from the date of Mr. Wilding's appointment as liquidator the company ceased to exist as a company, and ceased to exist as a going concern."

These statements are approximately correct. The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented

(1) [1896] 1 Q. B. at p. 684.

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Watson.

by the liquidator, who could not himself carry on its business without the special leave of the Court. But the radical right to the business continued to be an asset of the company; and if it had been so successful under the management of Mr. Kelly as to yield profits sufficient to meet the claims of debenture-holders, who had no interest beyond that of mortgagees, it would, no doubt, have been at once reclaimed by the liquidator for the behoof of the general creditors. In point of fact, the management of the receiver appears to have been so far successful that neither the first debenture-holders, nor the trustees for the second debenture-holders, nor the liquidator, seem to have thought it expedient to disturb it.

None of these circumstances appear to me to be sufficient to afford a solution of the question which your Lordships have to decide. If I had been of opinion that the trustees for the second debenture-holders stood in the relation of principals to Mr. Kelly before the liquidation, I should not have hesitated to hold that such relation was not altered by the supervening incapacity of the company to act by, or incur any obligation through, an agent. But, not being of that opinion, I am at a loss to understand upon what principle the trustees of the debenture-holders became subrogated as principals, in room and stead of the company, as soon as it incurred a statutory incapacity to occupy that position. The reasoning of the learned judges who were adverse to the appellant appears to me to involve this proposition, which, to my mind, is fallacious—that in all cases where an individual, acting under a power of attorney or similar warrant, appoints an agent for a company, he necessarily becomes the principal of that agent whenever the company ceases to be legally capable of imparting any authority to the agent, if the agent, without obtaining any new authority from him, chooses to continue his management.

Apart from that general and doubtful proposition, it was admitted by the respondents' counsel that, after liquidation, nothing occurred which could alter the relation in which the appellant and his co-trustee stood to Mr. Kelly, the receiver, with the single exception of the fact that, from and after September, 1893, the counter signature of Mr. Tryon to the

cheques passed upon his bank account by the receiver was discontinued. It was curious to observe that the respondents' counsel, who strenuously maintained the view of the Master of the Rolls, that the observance of that condition was sufficient to make the trustee liable before liquidation, were driven to argue, with equal vigour, that its non-observance, after liquidation, at the time when their clients sold goods to the receiver, was attended with the same legal result. In point of fact, it does not appear by whom or under what authority that check was removed; but, assuming its removal to have been sanctioned by the trustees, it appears to me that the circumstance could not of itself, or in combination with the other features of this case, have the effect of transforming the trustees into principals of the receiver.

I am therefore of opinion that the judgment appealed from ought to be reversed, with costs to the appellant here and in both Courts below. I have only to add that, had the case not been attended with much variance of judicial opinion, and been of considerable importance to that large class of persons who lend their money on debenture to limited companies, I should have been content to express my concurrence in the careful and exhaustive judgment of Rigby L.J.

LORD HERSCHELL (after stating the facts). My Lords, the Lord Chief Justice, who tried the action without a jury, gave judgment for the plaintiffs, and this judgment was affirmed by the Court of Appeal (Rigby L.J. dissenting). The question in the case was, in the opinion of the Lord Chief Justice, one of fact, and not of law at all. But the facts were not in dispute. The goods were ordered by Kelly and not by the appellant and his co-trustee. They certainly gave Kelly no express authority to purchase for them, nor did they expressly appoint Kelly to act as their agent in carrying on the business or indeed to act as their agent at all, or to pledge their credit. If then, they are liable to pay for the goods, it must be because in the circumstances I have detailed, and notwithstanding the facts to which I have just alluded, the law made them Kelly's principals, and imposed such liability upon them. Though the Lord Chief

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Herschell.

Justice did not decide the point, he indicated the impression, at least, that from the outset Kelly was carrying on the business, not for the company, but for the defendants, that from the time he was appointed receiver, they and not the company were his principals. The Master of the Rolls, whilst agreeing with the Lord Chief Justice that it was not necessary to decide the point, expressed a distinct opinion that Kelly was appointed, not such a receiver as was contemplated by the contract, but as agent for the trustees.

Though it may not be essential, I think it very important to determine in what capacity Kelly originally acted, and whose agent he was. For so far as he and those with whom he dealt were concerned, he carried on the business in precisely the same manner from the beginning to the end. He gave the orders in the same form. He received in terms no new authority. If the trustees were originally his principals, no doubt they continued so to the end. If, on the other hand, the company were at the outset the principals, it will be necessary to inquire whether there were any acts done by the trustees which, in the absence of an express authority to act for them, made Kelly their agent to purchase goods, or generally to carry on the business.

It is to be observed that at the time when Kelly was appointed receiver the trustees had no power to interfere with the company in the conduct of their business, except by appointing a receiver under the 13th clause of the deed of May 18, 1892. The security was not then enforceable: they had no power to enter into possession of the mortgaged premises. Apart then from the proviso to be found at the end of the instrument appointing Kelly receiver, I do not think it could be doubted that he was duly appointed receiver for the company, and that they and not the trustees were alone liable for his acts and defaults. Mortgage deeds frequently empower the mortgagee to appoint a receiver for the mortgagor. What then was the effect of the added proviso? The Master of the Rolls regarded it as depriving the receiver of the freedom ordinarily incident to his position, and reserving to the trustees a control over him with regard to every step he might take. I cannot so view it.

Its object seems to me clear. I do not think it was intended to reserve to the trustees any control over the management of the business, but only to act as a check to prevent any improper use by the receiver of the moneys of the company and to ensure that they should be properly applied. Mr. Tryon, by whom the cheques were to be countersigned, was, it is true, solicitor to the trustees, but he was also the chairman of the company. His function was merely to see that the cheques were drawn for payment of the company's liabilities. But, even assuming that the company would have been entitled to refuse to let Kelly occupy the position of receiver for the company on the ground that the terms of his appointment were not such as were warranted by the deed of May, 1892, they did not do so. They allowed him from the date of his appointment to conduct their business as a receiver appointed under that deed. If the proviso introduced a check upon the acts of the receiver which the deed did not authorize, it was quite competent for the company to assent to and sanction the introduction of that check. And one can well understand that the company would regard it as in their interest, and would desire that there should be such a check upon the action of the receiver. I cannot myself entertain any doubt that when Kelly took over the management of the business under his appointment he did so with the full assent of the company and as receiver for them. Supposing before they went into liquidation an action had been brought against them for the price of goods ordered by Kelly, what answer would they have had? Could they possibly have maintained that he was not receiver for them but for the trustees, when the trustees had at the time no power to appoint a receiver except for the company, and when the company had recognised his appointment and permitted him to act as receiver? I cannot think so.

As soon as the order was made for the winding-up of the company it became, as from the date of the petition, incapable of entering into contracts without the sanction of the Court. The contracts made by Kelly after that date certainly did not bind the company. They could not be principals in those contracts.

The reasoning which led to the conclusion in favour of the

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Herschell.

respondents appears to have been this: that after the winding-up order the company could no longer be principals; that Kelly, who contracted in the same terms as before, was not liable upon the contracts as principal; that the appellant and his co-trustee were aware that the company were no longer principals; that they permitted Kelly to carry on business as before when they could at any time have displaced him; that the business was really being carried on for them, and that, therefore, they are liable as principals on Kelly's contracts.

It is clear that after the winding-up order the appellant and his co-trustee did not in terms give Kelly any new authority. They did not interfere in any way. He carried on the business afterwards just as he had done before. They did not expressly authorize him to enter into any contracts, or to carry on the business on their behalf. If, then, they are liable as principals it must be because an authority to do so is to be implied from the circumstances.

I have to observe, in the first place, that even if Kelly could not be made liable on the contracts, and if the company could not be treated as his principals, it by no means follows, in my opinion, that there must be some other principal. Where an agent purports to contract for another in such terms as not to make himself a contracting party, and he has no authority from that other to bind him as principal, neither the agent nor any one else can be sued on the contract, though the agent may be subject to the same liability as if he had been a party to the contract in respect of his breach of an implied warranty that he possessed the authority which he represented himself to have. If, then, neither Kelly nor the company are liable on the contract, this does not shew that someone else must be, or go a step towards proving that the appellant and his co-trustee were the principals. It is not necessary to decide whether Kelly could be made liable for the price of the goods.

It is said that the appellant and his co-trustee might have displaced Kelly, and so put an end to his carrying on of the business. This is true. But the holders of the first mortgage might equally have taken this step, as indeed they did at a later date. This non-interference by the appellant and his "per-

mitting" Kelly, in this sense, to carry on the business, cannot of itself make Kelly his agent if he was not so otherwise. Kelly was certainly not held out to the world as the agent of the trustees for the second debenture-holders. The respondents knew nothing about them, and did not give credit to them. The respondents, therefore, can only succeed by shewing that the contracts were made on behalf of the appellant and his co-trustee and with their authority. What, then, wrought the change by which Kelly not only ceased to be agent for the company, but became the agent of these trustees? I gather that the answer to this question would be that from the date of the winding-up order the business was carried on for the benefit of the trustees. I do not see, however, that it was any more carried on for the benefit of the trustees after that date than before. The profits made by the carrying on of the business of the company were, before as well as after the winding-up order, part of the security for the payment of the debts due to the debenture-holders, and after as well as prior to the winding-up the profits of the business, subject to the claim of the mortgagees, belonged to the company. It had not ceased to exist; it could still hold and also acquire property. If the business had proved profitable and the assets of the company had been more than sufficient to discharge the mortgage claims, the liquidator of the company could, and doubtless would, have intervened, and applied the surplus to the payment of the creditors of the company, and all that remained after they had been paid would have been the property of the company.

Prior to the decision of the case of *Cox* v. *Hickman* (1) in this House it would, no doubt, have been open to contention that, under the circumstances which existed in this case, the business was being carried on for the benefit of the mortgagees, and must be treated as their business, and that they would therefore be liable upon contracts made by the person who carried it on. But since the decision of that case, such a proposition can no longer be maintained. I think the effect of the judgments in *Cox* v. *Hickman* (1) has been overlooked in the judgments appealed from.

In that case an insolvent firm, by a deed of arrangement with

(1) 8 H. L. C. 268.

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Herschell.

their creditors, assigned their business to certain of the creditors as trustees. These trustees carried on the business under the name of "The Stanton Iron Company." In that name they ordered goods of the plaintiff, and accepted bills for the price. The question in the action was whether the other creditors (two of whom were sued) were liable as principals in the transaction. It was contended that they were so, because they were parties to the deed of arrangement by which the net income of the business was to be distributed rateably among the creditors of the firm, and which empowered a majority in value of the creditors present, at meetings called for the purpose, to make regulations as to the mode of conducting the business or to order its discontinuance. Notwithstanding these circumstances, this House held the defendants not liable. There the business was being carried on for the benefit of the creditors of the insolvent firm just as much as it was here carried on for the benefit of the appellant and his co-trustee, or those whom they represented. And those creditors as much authorized and permitted it to be carried on in the way it was as did the appellant and his co-trustee in the present case. Moreover, the persons who conducted the business in the case referred to were subject to a control and interference by the creditors generally, to which there is no parallel in the present case.

It appears to me that the plaintiff in *Cox* v. *Hickman* (1) had a stronger ground for contending that the defendants were liable than the present plaintiffs have. And I think it would be impossible to decide in favour of the respondents on the ground that the appellant permitted the business to be carried on for his benefit without overruling the decision of your Lordships' House in that case.

I entirely agree with the view expressed by Rigby L.J., and I think the judgment appealed from should be reversed.

LORD MORRIS. My Lords, I am of the same opinion.

LORD DAVEY. My Lords, were it not for the judgments delivered in the Courts below, I should not have thought that this case presented much difficulty.

(1) 8 H. L. C. 268.

In my opinion there can be no doubt that at the date of his appointment the receiver, though nominated by the mortgagees, became, both in fact and in law, the agent of the mortgagor, i.e., of the company. That he was so by the express terms of the power under which he was appointed is undisputed. The purpose for which he was appointed was in order to make provision for payment of the company's mortgage debts, which was, in my opinion, a purpose of the company. It is said that certain directions which were given to the receiver, e.g., to open a banking account with Messrs. Goslings and Sharpe, and that his receipts and cheques should be countersigned by Mr. Tryon, were in excess of the power. Perhaps they were. I do not know. But his appointment with these provisions was accepted and acquiesced in by the company, and the directors gave up the custody of the company's property to him, and allowed him to conduct the business as a duly appointed receiver in the manner directed by the terms of his appointment. If the company did not agree, any terms in excess of the power were not binding on the receiver, for it cannot be pretended that there was any intention on the part of the mortgagees to appoint a receiver except under the power, and indeed they had no authority at that time to do so. The fact that the mortgagees were to obtain the benefit of the appointment through the payment of their interest or principal, or had the right to exercise certain control over the conduct of the business, would not, of course, make him their agent for the purpose of pledging their credit. One need only refer on this point to the judgments delivered in this House in *Cox* v. *Hickman* (1), and the judgment of the Judicial Committee in *Mollwo* v. *Court of Wards*. (2) If he was not agent of the appellants originally, did he become so on the winding-up of the company? I assume that the power to carry on the business so as to pledge the credit of the company and make the company liable to be sued on contracts made by him came to an end. The receiver, however, continued to exercise the power of management, and to carry on the business in the same manner as he had done before the

(1) 8 H. L. C. 268. (2) L. R. 4 P. C. 419.

H. L. (E.) 1897 GOSLING v. GASKELL. Lord Davey.

winding-up. He purported to exercise powers which I will assume he no longer possessed. I forbear to say what may be the legal consequence to himself if he did so. But I am unable to see how, without any act or assent on their part, it made him the agent, for the purpose of pledging their credit, of persons who had not previously conferred that authority on him, and never contemplated or intended doing so, or held themselves out as his principals. I agree with the judgment of Rigby L.J., and I concur with your Lordships in the Order proposed.

Order appealed from reversed (so far as complained of) with costs here and below; cause remitted to the High Court.

Lords' Journals, July 27, 1897.

Solicitors for appellant: *Saltwell, Tryon & Saltwell.*
Solicitor for respondents: *Cecil J. Rawlinson.*

[HOUSE OF LORDS.]

H. L. (E.) 1897 *March* 19, 23; *April* 6; *July* 29.

THE OWNERS OF No. 7 STEAM SAND PUMP DREDGER . . . . . } APPELLANTS;

AND

THE OWNERS OF SS. "GRETA HOLME" . . . . . } RESPONDENTS.

THE "GRETA HOLME."

Admiralty—Damage by Collision—Loss of Use of Dredger—Remoteness of Damage—Mersey Harbour Trustees.

Owing to a collision with a ship (the ship being in fault) a steam dredger was injured and the owners were deprived of the use of it for some weeks and the dredging works were delayed. The dredger belonged to trustees charged with the duty of maintaining a harbour and waterway, deriving their funds from rates and not entitled to distribute profits. The trustees having brought a collision suit in the Admiralty against the shipowners:—

Held (Lord Morris dissenting), reversing the decision on this point of

the Court of Appeal, [1896] P. 192, that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger.

THE following statement of facts is taken from the judgment of Lord Watson :—

On March 6, 1895, the steamship *Greta Holme*, belonging to the respondents in this appeal, collided, in the River Mersey, with the Steam Sand Pump Dredger No. 7, which is the property of the appellants, the Mersey Docks and Harbour Board. Cross actions were brought by the parties, which were consolidated, and were thereafter disposed of by an order of the Admiralty Court, finding that the *Greta Holme* was alone to blame for the collision, and condemning her owners in damages and costs. By the same order the amount of damages was referred to the determination of the registrar, assisted by merchants, and the counter-claim of the respondents was dismissed. The judgment of the Admiralty Court was subsequently affirmed by the Court of Appeal.

This appeal relates to two items of damage which occur in the claim submitted to the registrar by the present appellants. The first of these is 1500*l.*, being a sum calculated at the rate of 100*l.* per week for fifteen weeks during which the dredger was under repair, and could not be used for any purpose by her owners; and the second is 91*l.* 8*s.* 6*d.* as an allowance for the further period of sixteen days, during which she could only be used as a hopper barge, her machinery being still under repair.

The registrar, with the concurrence of the merchants by whom he was assisted, reported against both these items of claim. The main reason assigned for that conclusion was that the appellants are not in the position of a trading company which is entitled to claim for loss of profits, and, "although their dredging operations were, no doubt, delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." The report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, consisting of the Master of the Rolls, with A. L. Smith and Rigby L.JJ. (1) The

(1) [1896] P. 192.

H. L. (E.)
1897
OWNERS OF No. 7 STEAM SAND PUMP DREDGER
v.
OWNERS OF SS. "GRETA HOLME."
THE "GRETA HOLME."

learned judges concurred in the observations made in the report of the registrar with reference to the position of the appellants as a corporation which does not exist for the purpose of making profits, and as to the absence of any tangible proof of actual loss.

The appellants are a body of trustees who are charged with the duty of maintaining the harbour works and waterway of the River Mersey in the interest of the public, and in particular of those members of the public who either own vessels which use the harbour, or are otherwise directly interested in the trade of the port. They derive their available funds from rates levied from those who use their undertaking, which they are empowered to increase, in the event of these being insufficient to meet necessary expenditure, and are bound to diminish in the contrary event of the rates being more than sufficient for that purpose. Towards all persons who have an interest in the prosperity of the harbour, the duty of the appellants is to maintain its efficiency in competition with other ports in the United Kingdom; but the only members of the public who have a direct pecuniary interest in their administration are those who pay the rates. As representing their interests, the appellants, although they do not earn profits for distribution amongst a body of shareholders, are nevertheless bound to conduct their operations in an efficient manner, and with due economy; and, whenever loss does arise from illegal interference with their works or plant, it must come out of the pockets of the ratepayers, unless it is recouped by the wrongdoer.

At the time of the collision, No. 7, and a twin dredger, both of which are constructed upon a principle which is novel, were engaged in deepening the river near to the landing-stage for large foreign ships, that being a necessary operation, and one which the appellants were desirous of completing. During the repair of No. 7, the other dredger continued to work at the same part of the river; but the result of her losing her companion was, that during the period of fifteen weeks and sixteen days, so far from making effective progress in the work of deepening, at the end of that time the bottom of the channel stood at a higher level than it had occupied at the commence-

ment. It is proved that for the use of a dredger of the same class as No. 7 a rent of 100*l.* per week could have been obtained without difficulty; and also that the appellants would not have let the dredger, even if it had not been injured by the collision, because it was of importance to them that the work in which it was engaged should be completed without delay.

The appeal was argued on March 19 and 23 before Lord Herschell, Lord Macnaghten, Lord Morris, and Lord Shand. It was heard again on April 6.

April 6. *Sir Walter Phillimore* and *T. G. Carver* (*W. S. Glynn* with them) for the appellants. The owners are entitled to damages for the loss of the use of the dredger, as there were none to be hired. The registrar's finding that no "tangible pecuniary loss" was sustained is inconsistent with the facts. There was evidence to shew that she might have been let on hire for 100*l.* a week and there were recent applications for its use. Besides, pecuniary damage is not the only subject of claim recognised in our Courts. It is no doubt difficult to measure a loss which is not directly pecuniary, but that is no reason for giving only nominal damages. The least possible claim is the interest on the price of the dredger for the time; but damages are also due because the appellants' work in deepening the river was retarded.

There is no rule of damages exclusively applicable to Admiralty cases. In *The Argentino* (1) Bowen L.J. said the rule was the same as at common law. The damages claimed, in the words of Lord Herschell, in *The Argentino* (2) on the appeal to this House, "flow directly and naturally . . . . from the wrongful act." In *The Gazelle* (3) Dr. Lushington said the principle was restitutio in integrum. *The Clarence* (4) is distinguishable; the ship was disabled, but the company had a number of ships in reserve, and suffered no inconvenience from the temporary withdrawal of the injured vessel.

Aspinall Q.C. and *D. Stephens* (*H. Holman* with them) for the respondents. There must be direct proof of money loss to

(1) (1888) 13 P. D. 191, 200.
(2) (1889) 14 App. Cas. 519, 523.
(3) (1844) 2 Wm. Rob. 279, 281.
(4) (1850) 3 Wm. Rob. 283.

H. L. (E.)
1897
OWNERS OF NO. 7 STEAM SAND PUMP DREDGER
v.
OWNERS OF SS. "GRETA HOLME."
THE "GRETA HOLME."

sustain such a claim. That was the principle laid down in *Hughes* v. *Quentin* (1), in which injury had been done to a horse. There is no evidence of pecuniary loss, and the prospect of letting out the dredger was remote and inappreciable. This case is precisely the same as *The Rutland* (2), cited below from the *Shipping Gazette*, December 6, 1886. Direct estimable loss and strict valuation are required: Mayne on Damages, pp. 44, 379. Indirect consequential loss can only be entertained when the amount can be ascertained: *The City of Peking* (3); *Hobbs* v. *London and South Western Ry. Co.* (4) The damages must be substantial.

Phillimore in reply.

The House took time for consideration.

July 29. LORD HALSBURY L.C. My Lords, the owners of the steamship *Greta Holme* have been found liable to pay for damages caused to the steam sand pump dredger No. 7 for whatever damage those owners are by law entitled to recover by reason of a collision which happened in the River Mersey.

The only question in this case is whether the respondents are liable to pay damages to the appellants for the loss by the latter of the use of the steam-pump dredger, which was rendered incapable of doing its work for a certain period of time. That the respondents were liable for damages, and that they would have been liable for some damage, at all events, if the owners of the steam sand pump dredger had been an individual trading in the use of such a machine, does not appear to be denied, though in respect of some part of the damage the Master of the Rolls throws out a doubt, which I am not quite able to follow, as to the remoteness of the damage insisted on.

As I understood the argument of the respondents, it came to this: That the appellants are a public body who have to maintain the harbour works and the River Mersey in a condition fit for public use; that as they are not authorized to make any use of their public machinery for profit, such as a private individual would have been entitled to make, they are not

(1) (1838) 8 C. & P. 703.
(2) [1896] P. 195, n. (2).
(3) (1890) 15 App. Cas. 438.
(4) (1875) L. R. 10 Q. B. 111.

entitled to recover damages, although the fact be not denied that by the negligent act of the respondents the appellants were deprived of the use of their machine for a certain number of weeks.

I confess I have some difficulty in following the reasoning or seeing how the conclusion flows from the premises. It is a sufficiently familiar head of damages between individuals that, if one person injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy. Nor has it ever been doubted, so far as I am aware, that if a passenger in a railway collision is injured by the negligence of the railway company he may recover damages, not only for the pain and suffering and injury to his health, &c., but also for the loss which he sustains by reason of being unable to pursue his ordinary avocations.

In *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1), where the question arose whether an executrix might recover, in an action for breach of contract against the railway company, the damage to the testator's personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business, it was held without doubt that damages for the loss of not being able to attend to business were recoverable. The question there arose in a manner which rendered it peculiarly necessary to determine whether the damage sought to be recovered was the natural and direct consequence of the breach. And, indeed, I think it would have hardly been contested in that case, but that the question there arose whether the maxim "Actio personalis moritur cum personâ" applied: *Knights* v. *Quarles.* (2) The distinction between "tort" and "contract," though pertinent in that case, is immaterial here: see observations of Bowen L.J. in *Cobb* v. *Great Western Ry. Co.* (3)

Such being the general state of the law, it is difficult to see upon what ground the legal character filled by the appellants

(1) (1875) L. R. 10 C. P. 189. (2) (1820) 2 B. & B. 102.
(3) [1893] 1 Q. B. at p. 464.

H. L. (E.)
1897
OWNERS OF No. 7 STEAM SAND PUMP DREDGER v. OWNERS OF SS. "GRETA HOLME."
THE "GRETA HOLME."
Lord Halsbury L.C.

here can affect the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the dredger was being repaired. That the dredger was required for their use cannot be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both those facts are found adversely to the respondents: then why are not the appellants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to shew that during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrongdoer.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed and the appeal allowed.

As I understand it is the wish of the parties not to be sent back for the assessment of damages, and only because it is their wish, I am ready to express the opinion that 500*l.* ought to be granted them in respect of damages hitherto refused.

The distinction between the two heads of damage claimed in respect of the difference between the use of it as a dredging machine and as a barge is one which I decline to discuss. It is a mere calculation of damages in respect of the loss of the machine, which the parties ought to have settled between

themselves. At all events, I explain that the sum which I suggest is intended to comprehend both heads.

LORD WATSON (after stating the facts above given). My Lords, that it is a wrongful act, although it may not be wilful but simply negligent, to deprive either an individual or a corporation of the services of a dredger or other plant which is constantly required for useful purposes, does not appear to me to be a proposition admitting of serious dispute; and I am not prepared, unless in circumstances which do not occur in this case, to lay down the rule that a corporation which does not pursue its operations for the sake of gain, in the ordinary sense, does not suffer appreciable damage from their interruption. The Master of the Rolls expressed an opinion that the damages sought by the respondents, if not too shadowy, "were too remote to be the proper subject-matter of damages in a collision suit." None of the other learned judges in the Court below appear to have taken that view; and on consideration I am unable to accept it. The loss to the appellants of the services of dredger No. 7 for a period exceeding the quarter of a year was the natural, necessary, and direct result of her collision with the *Greta Holme*, to whose fault the collision was solely attributable; and, in my opinion, there is no maritime or other rule which protects the owners of the offending ship against damages attendant upon results of that kind.

The evidence of Mr. Lyster, assistant engineer to the appellants, shews that it would have been impossible to supply the place of No. 7 by chartering another suitable dredger. If it had been possible, and if the reasons assigned for the judgments under appeal are valid, that would not have been a justifiable proceeding on the part of the appellants, who, according to these reasons, were suffering no appreciable damage from the want of a dredger. According to these reasons, had they chosen to go to the expense of hiring, they would not have been entitled to recover a single sixpence of the hire paid by them from the respondents. That is, in my opinion, the logical result of the principles which have been followed by the Courts below in the decision of this case—principles which, if affirmed,

H. L. (E.) 1897

OWNERS OF No. 7 STEAM SAND PUMP DREDGER v. OWNERS OF SS. "GRETA HOLME."

THE "GRETA HOLME."

Lord Watson.

would be very far-reaching. They seem to me to go this length: that a corporation who invest large sums of money in a dredger, or in any other article which they intend to use, and do use continuously, for purposes which are of interest to them, and protect the pocket of the ratepayers, although they are not productive of private gain, can recover from a wrongdoer the cost of repairing injury done to these articles, but are not entitled to recover damages from the person who deprives them of the use of such articles without lawful cause.

Upon the whole matter I am of opinion that the appellants have succeeded in proving substantial and not merely nominal damage; and that opinion is not weakened by the fact that, owing to the enforced absence of No. 7 dredger, there was a deposit of silt which would not otherwise have accumulated, and which required to be removed after her return to duty. To this extent I agree with the observations of the learned judges, that the data for estimating the amount of substantial damage are not precise. In cases like the present that difficulty is sometimes inevitable and is of common occurrence; but it is a difficulty which can be easily and is often satisfactorily overcome by a jury under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damage; but, having taken the whole facts and probabilities of the case into consideration, I have come to the conclusion that, in respect of the two items in question, the sum allowed to the appellants may be reasonably assessed, as your Lordship proposes, at 500*l*.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL. My Lords, I entirely concur and shall only add a few words. I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called "tangible pecuniary loss," by which I understand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained. This was not disputed. But

it is said that inasmuch as the plaintiffs are trustees not carrying on their undertaking for profit, and have lost no money owing to being deprived of the use of their dredger, but have only been delayed and inconvenienced in making improvements for the benefit of the port, they are not entitled to damages. There is no authority for such a proposition. The only case relied on was that of *The Rutland*. (1) I am not satisfied that Sir James Hannen intended to lay down any such proposition. I think the true explanation of the case is that the learned judge was not satisfied that any damage was sustained, inasmuch as the wrongful act might only have caused the dredger to be idle at one time rather than another without detriment to the plaintiffs. However this may be, I think the proposition contended for cannot be supported on principle. If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sums so paid could have been recovered. How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to. But I think they are also entitled to general damages in respect of the delay and prejudice caused to them in carrying out the works entrusted to them. It is true these damages cannot be measured by any scale; but that would be equally true in the case of damages in respect of the deprivation of an individual of a chattel which he had purchased for purposes of comfort and not profit. I think the damages proposed to be assessed are reasonable.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, this appeal is brought against an order of the Court of Appeal which affirmed the judgment of the President of the Probate and Admiralty Division, who had

(1) [1896] P. 195, n. (2).

H. L. (E.) 1897 OWNERS OF No. 7 STEAM SAND PUMP DREDGER v. OWNERS OF SS. "GRETA HOLME." THE "GRETA HOLME." Lord Morris.

affirmed the report of the registrar of that Division by which he, assisted by two merchants, ascertained the damages sustained by the appellant by reason of the collision at the sum of 3691*l.* 11*s.* 3*d.* The appellants had claimed 5994*l.* 3*s.* 1*d.* for damages under thirteen different heads of damage, which are set out in the schedule to the report. The registrar allowed damages in respect of eleven of the claims; he did not allow any amount for the claims Nos. 11 and 12, amounting to 1591*l.* 8*s.* 6*d.* in respect of the loss of the use of the dredger while undergoing repair. In my opinion, the order of the Court of Appeal should be affirmed.

The question which arises in this case was decided by Lord Hannen in 1886, when President of the Probate and Admiralty Division. I refer to the case of the ship *Rutland* (1), a short-hand-writer's report of the judgment in which has been furnished by the respondents. In that case, as in this, a collision took place between the ship *Rutland* and a dredger in Warkworth Harbour, in which the ship was found to be in fault. On an inquiry directed, as in this case, to the registrar, he did not allow any sum for the detention of the dredger while undergoing repair and alterations. On appeal from his report, Lord Hannen, in affirming the report, states the matter thus: "The dredger is an instrument employed by the harbour authorities, and not for the purpose of gaining any profit from day to day or from year to year, but for the purpose of making their harbour a good and convenient harbour, so that it may attract vessels of a greater draught of water, I suppose, than could enter it unless they made use of this dredging apparatus. It is, therefore, not like a ship which is built for the purpose of being employed on voyages, which, as I have said, if damage is done to it, a reasonable probability of its being employed would entitle the owner of the vessel to compensation for being unable to employ it for the purpose of earning freight. There is no such prospect in this case, and it must be looked at purely from that point of view. What damages capable of being estimated in money have the harbour authorities suffered by this dredger being disabled? There has been a great deal of evidence, and the

(1) [1896] P. 195, n. (2).

registrar has come to the conclusion that it has not been shewn that any tangible damage has been done to the owners of the dredger, and none of the things that were indicated or that were sought after have been established—for instance, the inquiry is made, and nobody is able to say that it would have been let out to anybody else, and it has not been suggested that it was a probable thing that it would have been let out during the time that was necessary for doing the repairs."

This case is almost identical in the important facts with the case of the ship *Rutland* (1); but, apart from authority, I am of opinion that the plaintiffs' attempt to recover the sum of 1591*l.* claimed by them should fail. Their engineer stated that if they chose to let the dredger they could get 100*l.* a week for the hire of the dredger, and that they had applications from Calcutta and elsewhere. Such evidence is in my opinion chimerical. The plaintiffs had no idea whatever of hiring the dredger; it was required for, and intended to be used in, the work in which the plaintiffs were engaged of clearing and deepening the river. I entirely agree with the Master of the Rolls in treating this evidence as imaginative. If the possibility of hiring the dredger is struck out, what damage in money's worth did the plaintiffs sustain by reason of the loss of the use of the dredger for the fifteen weeks claimed for? Apart from personal inconvenience or aggravating circumstances in an action of the character of the present, a plaintiff can only recover for pecuniary loss. Personal inconvenience or any aggravating circumstances are wholly out of consideration in the present suit.

As the character of the detriment is merely pecuniary, it is necessary for the plaintiffs to give some reasonable proof of actual loss sustained by them—they can only get indemnity for the loss of time during which the dredger was detained for repairs, which could only be estimated on the principle what would or probably would have been obtained by the plaintiffs if there had been no collision. The onus of giving proof of loss incurred rested upon the plaintiffs: they gave none; they did not hire a dredger in place of the one detained under repair. True, the work may have been to some almost inappreciable

(1) [1896] P. 195, n. (2).

H. L. (E.) 1897

OWNERS OF No. 7 STEAM SAND PUMP DREDGER *v.* OWNERS OF SS. "GRETA HOLME."

THE "GRETA HOLME."

extent delayed, but no pecuniary loss arose to the plaintiffs thereby. Every American liner or other ship came and went as before; there was no loss of dues. No estimate is given of the period when, if ever, the work of dredging would cease. In my opinion damages in the present action would be on the merest guess, and I can see no ground for selecting the sum of 500*l.* rather than any other sum.

LORD SHAND. My Lords, I concur in all that has been said by your Lordships who are of opinion that in this case the judgment should be reversed, and the sum of 500*l.* given in the way of damages.

Order of the Court of Appeal reversed as to these items of damage; the respondents to pay the appellants 500*l. in respect of damages for the loss of use of the dredger; no order as to costs; cause remitted to the Admiralty Division.*

Lords' Journals, July 29, 1897.

Solicitors for appellants: *Rowcliffe & Co., for A. T. Squarey, Liverpool.*

Solicitors for respondents: *Downing, Holman & Co.*

[HOUSE OF LORDS.]

BENSAUDE AND OTHERS . . . . . APPELLANTS; H. L. (E.) 1897 July 8.

AND

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED . RESPONDENTS.

Insurance (Marine)—Loss of Freight—Exception—"Claim consequent on Loss of Time"—Loss of Time arising from Peril of the Sea.

A time policy of insurance on freight was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." During a voyage the steamer's main shaft broke through a peril of the sea and the vessel returned to her port of loading. It was there found that the necessary delay for repairs would frustrate the objects of the adventure, and the charterers, as they were entitled to do by the foreign law applicable, put an end to the charter and the freight was lost. In an action on the policy for total loss of freight:—

Held, that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

The decision of the Court of Appeal, [1897] 1 Q. B. 29, affirmed.

THE appellants, owners of the S.S. *Peninsular*, having contracted to carry a cargo by that vessel for the Portuguese Government from Lisbon to West Africa, the freight to be payable after arrival, insured the freight with the respondents, underwriters, by a time policy covering total or constructive total loss and general average only. The perils insured against included perils of the seas. Pasted upon the policy was a slip containing these words: "Warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise."

The *Peninsular* having left Lisbon with the cargo on board her main shaft broke owing to perils of the sea, and she had to be towed back to Lisbon. It was there found that the damage could not be repaired at Lisbon, and that she must be taken to Cadiz. Her cargo was then discharged at Lisbon. The delay necessary for taking the *Peninsular* to Cadiz and repairing the damage was such as to frustrate the objects of the adventure and the Portuguese Government, as they were entitled by

H. L. (E.) 1897 BENSAUDE v. THAMES AND MERSEY MARINE INSURANCE COMPANY.

Portuguese law to do, put an end to the appellants' contract. The appellants then brought an action against the respondents upon the policy claiming for a total loss by perils of the sea. Collins J. by whom the action was tried held that the defendants were not relieved from liability by the exception "warranted free," &c., and gave judgment for the plaintiffs for the amount claimed. This decision was reversed and judgment entered for the defendants by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.). (1) The only question raised by the present appeal was upon the construction of the exception "warranted free," &c.

Bigham Q.C. and *Bucknill Q.C.* (*D. C. Leck* with them) for the appellants. The appellants lost their claim for freight owing to the breaking of the shaft, that is owing to perils of the sea. The claim is consequent, not upon the loss of time, but upon the disabling of the vessel by perils of the sea, and arose at once before any loss of time had taken place. The adventure became impossible when the shaft broke, and no time was in fact lost. The test is, has the damage caused by the sea peril been such as to defeat the adventure? The question of time is important only as measuring the effect of the catastrophe. A claim for a loss caused by such damage is not accurately described as a claim consequent upon the loss of time. If underwriters intend to protect themselves by exceptions they must do it in unmistakable language. The policy was a time policy, and there is no reason for construing it with special reference to a voyage risk. The slip might easily get pasted on the policy to which it was not intended to apply. It was not part and must not be treated as part of the policy.

Joseph Walton Q.C. and *Scrutton* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, this case has been very ably argued for the appellants, but I think none of your Lordships entertain any doubt as to the conclusion at which we must arrive. If the words, on which the question turns, are to

(1) [1897] 1 Q. B. 29.

be read as part of the contract it is impossible to support the judgment of Collins J. The words, if they are part of the contract, seem to be very plain: "warranted free from any claim consequent upon loss of time arising from a peril of the sea or otherwise." The *Peninsular* broke her main shaft. It is not denied that if it was capable of being repaired within such time as would have enabled her to complete the adventure, there would have been no loss of freight. The reason why there was loss of freight was that the repairs would have taken so long a time as would have defeated the adventure. That is how the loss of freight arose.

My Lords, it has been assumed, and indeed it underlies the whole of the judgment of Collins J., that the right to insist upon the payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. Now there is a fallacy underlying that form of the argument, namely, that there must be a sufficiently ascertained condition of damage to shew at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. It would be only a question of evidence which one might ascertain at that time or wait until the facts had proved it by the occurrence of those facts subsequently. But the reason why the loss of freight had been incurred must be that the damage was of such a character that there was an impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it. The facts here have been ascertained, and we know why the freight was lost. Why was it? Not simpliciter because the main shaft was broken, but because the main shaft was broken under special circumstances—that is at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage.

But then the question comes whether that is included in the language "Warranted free from any claim consequent upon loss of time arising from a peril of the sea or otherwise." The main shaft being broken in consequence of a peril of the sea, what is the consequence of that? The consequence of that is that the vessel cannot, within the time, perform the voyage.

H. L. (E.) 1897

BENSAUDE v. THAMES AND MERSEY MARINE INSURANCE COMPANY.

Lord Halsbury L.C.

Does that, or does it not bring the case within the words "claim consequent upon loss of time arising from a peril of the sea"? If this exception is part of the contract, and if it is applicable to the contract into which the parties have entered, I cannot follow the argument that the present claim does not come literally within the words.

But there was a sort of faint effort made to suggest that it is not part of the contract at all. Nobody has ever ventured to say in terms that it is not, but there is a sort of insinuation to the effect that this warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that? It either is or is not part of the contract. If it is part of the contract it is perfectly immaterial what part of the contract it appears in. It might as well have been incorporated in the original policy itself.

But then it is said—or rather suggested—that this may not have been a sort of stipulation that was applicable to the particular contract which the parties were making. It appears to me that this case itself shews that those words can receive a reasonable and intelligible meaning as applicable to the contract into which the parties were entering. Then, why am I to reject the clause? Is it because it is pasted on? Is it because it is aside of the rest of the contract? No one can gravely suggest that. Then I have to construe this as part of the contract, and as I have already said this case itself furnishes an illustration of what the parties were intending to do. They intended to except out of the liability they had otherwise entered into a claim which was consequent upon loss of time arising from a peril of the sea. This claim seems to me to be in the strictest sense consequent upon loss of time so occasioned, in any ordinary and reasonable meaning that can be put upon the words. Therefore I think the judgment of the Court below was perfectly right, and I move your Lordships that it be affirmed.

LORD WATSON. My Lords, in this case I think it is part of the appellants' own case that the breaking of the shaft of the *Peninsular* owing to a peril of the sea rendered inevitable such

delay in the prosecution of her voyage as entitled the charterer to determine the adventure. The loss of freight in my opinion was consequent upon that delay in this sense—that but for the delay occasioned by the breaking of the shaft there would have been no loss to claim.

The only question that remains is, whether a clause which is one of the conditions of the document forming the contract between the parties is to receive effect or no. For my own part, I think there has been no cause whatever shewn for rejecting it. I entirely agree with the opinions expressed by the learned judges of the Court of Appeal, because I think with them that the case falls precisely within the words of exception which are introduced into that condition. I therefore concur in the judgment which has been moved.

LORD HERSCHELL. My Lords, this is a policy against total loss of freight. The learned counsel for the appellants were unable to suggest any case or class of cases to which the words of the warranty would apply, unless it were to such a case as is now before your Lordships. I quite agree that if you find in a policy, as you commonly do, a number of stipulations inserted, and with reference to the subject-matter of the policy one of those stipulations is, on its natural construction, inapplicable, it would not be right for the purpose of finding a meaning for it as applicable to that particular contract to torture or strain its language. The natural conclusion would be that the common form had been used with the insertion of certain warranties or conditions not applicable to the particular case. That is of course not an uncommon occurrence. But if with reference to the subject-matter of the policy the particular stipulation is applicable without any straining or torturing of the language, then it is the duty of the Court construing the contract to give that natural meaning and construction to it as applicable to the subject-matter of the contract.

Now can these words be properly applied to a policy against total loss of freight? It seems to me that they can, and that the present case is an illustration of a perfectly proper application of them. The whole basis of the claim of course must be

H. L. (E.) 1897

BENSAUDE v. THAMES AND MERSEY MARINE INSURANCE COMPANY.

Lord Herschell.

the loss of the subject-matter insured—that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability. It seems to me that not only is no violence done to the words, but that they receive the natural, the ordinary and reasonable signification when they are applied to such a case as this.

LORD SHAND and LORD DAVEY concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 8, 1897.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

BARRACLOUGH . . . . . APPELLANT;

AND

BROWN AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)
1897
May 28, 31; *June* 1; *July* 19.

Summary Jurisdiction—Jurisdiction of High Court—Right to Recover in Court of Summary Jurisdiction—Wrecks, Removal of.

Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction: he can only take proceedings in the latter court.

The construction of s. 56 of the Harbours, Docks, and Piers Clauses Act 1847 adopted in *The Crystal*, [1894] A. C. 508, applied to s. 47 of the Aire and Calder Navigation Act 1889 (52 & 53 Vict. c. xxxii.).

THE following statement of facts is taken from the judgment of Lord Watson:—

The appellant is secretary to the Undertakers of the Navigation of the Rivers Aire and Calder, and is the statutory officer entitled to sue on their behalf. The navigation of the River Ouse, within certain limits, is vested in these undertakers, for purposes of conservation and improvement, by several special Acts. The Ouse Improvement Act 1884 incorporated some of the powers and provisions of the Harbours, Docks, and Piers Clauses Act 1847, including s. 56, which relates to the removal of wreck or other obstructions to a harbour, dock, or pier, or the approaches to the same. By s. 47 of the Aire and Calder Navigation Act 1889 the following enactments are made with respect to the removal of sunken vessels: "If any boat, barge, or vessel shall be sunk in any part of the navigation, cuts, canals, docks, basins, or locks of the undertakers, or in the River Ouse within the limits of improvement defined by the Act of 1884, and the owner or person in charge of such boat, barge, or vessel, shall not forthwith weigh, draw up, or remove the same, it shall be lawful for the undertakers, by their agents or servants, to weigh, draw up, or remove such boat, barge, or vessel, and to detain and keep the same with her

H. L. (E.) 1897 BARRACLOUGH v. BROWN.

tackle and loading until payment be made of all the expenses relating thereto, or to sell such boat, barge, or vessel, and the tackle or loading thereof, or a sufficient part thereof, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the surplus, if any, on demand, or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction."

The clause just quoted enlarges the provisions of s. 56 of the general Act of 1847 in two particulars. In the first place, it extends the area within which the undertakers have the power of removal, beyond harbours, docks, or piers, and the approaches to the same so as to include the whole of the River Ouse within the limits of improvement defined by the special Act of 1884. In the second place, it authorizes the undertakers, when they have raised a sunken vessel under their statutory powers, to detain and sell, for reimbursement of the expenses which they have thereby incurred, not only such vessel or wreck, but the tackle and loading thereof.

On the night of August 20, 1894, the steamship *J. M. Lennard*, which at that time was owned by the respondents in this appeal, capsized and sank in the River Ouse, within the limits of improvement defined by the Act of 1884; and, therefore, in the event of the respondents failing to raise her, the undertakers were authorized to do so by s. 47 of their Act of 1889. It is matter of admission that the sunken vessel constituted an obstruction to the navigation of the River Ouse. The *J. M. Lennard* was fully insured, and notice was given to the underwriters, who made an unsuccessful attempt to raise her. On August 30 the respondents gave notice of abandonment to the underwriters, who accepted the notice, and on September 5 settled with the respondents for a total loss. After the date of that settlement, but not until then, the undertakers proceeded to exercise their statutory powers of removal. They began by spending 2778*l.* 8*s.* 8*d.* in an attempt to float the ship, which resulted in failure. They then resolved to remove the wreck by means of explosives, a result which they accomplished at the cost of 500*l.* 0*s.* 3*d.*

The appellant, on April 23, 1895, brought the present suit against the respondents, before the Queen's Bench Division of the High Court of Justice, for 3278*l.* 8*s.* 11*d.*, being the aggregate of the sums expended by the undertakers in endeavouring to raise and in removing the vessel. The defendants, by their defence and counter-claim, alleged that the stranding and damages consequent thereon were occasioned by the plaintiff's negligence. The facts, except as regards these allegations of negligence, being admitted, it was ordered by Mathew J., on a summons for directions, that the point of law as to the right of the plaintiffs to maintain the action should be argued on a day named. The order did not specify what the point of law referred to was, but it seems to have been, practically speaking, confined to the question what was the true construction of s. 47 of the Aire and Calder Navigation Act 1889. The claim was preferred upon two separate grounds: the first being, that the respondents, as owners of the ship at the time when she sank, are, at common law, responsible to the undertakers for the injury thereby done to the navigation of the River Ouse, and for all costs necessarily and reasonably incurred by them in repairing such injury; and the second, that s. 47 of the Act of 1889 makes the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers.

Both causes of action were insisted in before Mathew J., who gave judgment for the defendants, with costs. His Lordship was of opinion that the undertakers, in the event of a vessel being wrecked and becoming an obstruction to the waterway of the Ouse within the limits of their navigation, have no remedy other than that which is given them by their statutes. As to the second point, his Lordship held that the construction applied by this House in *The Crystal* (1) to s. 56 of the Harbours, Docks, and Piers Clauses Act 1847 was equally applicable to s. 47 of the undertakers' Act of 1889. On appeal, the decision of Mathew J. was affirmed. The Master of the Rolls and Lopes and Rigby L.JJ. were all of opinion that the case, so far as founded on s. 47, was ruled by the judgment of

(1) [1894] A. C. 508.

H. L. (E.) 1897 BARRACLOUGH v. BROWN.

this House in *The Crystal* (1); and that the undertakers have no right given them to recover their outlays from persons who were owners of the ship at the time of her sinking, but whose ownership had ceased before their operations commenced. No reference was made, in the opinion delivered by the learned judges, to the appellant's common law claim, which was renewed and insisted in by him at the bar of this House.

May 28, 31; June 1. *Sir W. Phillimore* and *Montague Lush*, for the appellant. Sect. 47 of the Aire and Calder Navigation Act 1889 makes the owner liable for the expense of removing the wreck. [Some of their Lordships having raised the question whether the High Court had jurisdiction, having regard to the concluding words of that section, that point was argued first.] It is true that the Act prescribes recourse to a court of summary jurisdiction; but no objection was raised below, both parties desired the decision of the High Court, and the Act does not exclude the jurisdiction of the latter. A debt was created which was recoverable in the way in which other debts may be sued for. The right at all events can be ascertained in the High Court, and Mathew J. was acting within his jurisdiction in ordering the point of law to be argued: Order xxv., rr. 1, 2, 3, 5. In *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2) a declaration of right was made without consequential relief. As matter of law—whether common or statute law—the respondents were primâ facie liable: and if that were determined against them the questions of fact would have to be determined. In the Court of Chancery questions of right, and even of contingent right, were often determined: *Bell* v. *Cade* (3), under the Special Case Act (13 & 14 Vict. c. 35); and so also under the Chancery Procedure Act (15 & 16 Vict. c. 86) s. 50. Moreover, the Ouse (Lower) Improvement Act 1884 (47 & 48 Vict. c. clxi.) makes the expenses in such a case a debt recoverable in any court of competent jurisdiction.

As to the merits, the owner at common law can abandon in

(1) [1894] A. C. 508. (2) [1892] 3 Ch. 242.
(3) (1861) 2 J. & H. 122.

the open sea, but not in an artificial cut, within the "limits of improvement." He remains the owner. It is admitted that the wreck was an obstruction to the navigable channel, and independently of statute there is a common law power to remove the wreck and sue the owner for the expenses in the form of damages. The Local Act of 1889 makes the owner at the time of sinking liable, because by s. 47 if he has sold afterwards he must hand over the surplus to the purchaser. This is also in accordance with the principles laid down in *The Utopia*. (1) This case is distinguishable from *The Crystal* (2), which was under the Harbours Act, 1847, and identical with *Smith* v. *Wilson* (3), which was under the Marine Act of Victoria, which precisely resembles the Act of 1889. There was a general liability on the respondents apart from this statute, upon which, if it exceeds what is prescribed by statute, the appellant is entitled to insist: *The Ettrick* (4), per Jessel M.R.

Joseph Walton, *Q.C.*, and *Lennard*, for the respondents, were not heard.

The House took time for consideration.

July 19. LORD HERSCHELL (after stating the facts). My Lords, at an early stage in the argument of the appeal the question was raised whether the High Court of Justice had any jurisdiction to entertain a claim for the recovery of expenses under the enactment I have just quoted, or to adjudicate upon it except by way of appeal from a court of summary jurisdiction. Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is

(1) [1893] A. C. 492, 496.
(2) [1894] A. C. 508.
(3) [1896] A. C. 579.
(4) (1881) 6 P. D. 127, 134.

H. L. (E.) 1897 BARRACLOUGH v. BROWN. Lord Herschell.

"to recover such expenses from the owner of such vessel in a court of summary jurisdiction." I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.

It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

Although all your Lordships, I believe, feel compelled to dismiss this appeal on the ground I have indicated, it may be satisfactory to the parties to know that, after having the case fully argued on the merits, your Lordships arrived at the conclusion that the same result must have followed even if the question of jurisdiction had been determined the other way.

I think the words "the owner" at the end of clause 47 do not mean the person who was owner of the vessel at the time she sank, if he had ceased to be owner before the expenses were incurred. The clause does not impose upon the owner the duty of removing his vessel; it only renders it lawful for the undertakers to remove her if he does not. And in the latter part of the clause the words used are "the owner," not "such owner," which one would have expected to find if the intention had been to refer to the same person throughout. I think the latter part of the clause refers to the person who was owner at the time the expenses were incurred, and not to the person who was owner when the vessel sank, if his ownership had ceased.

In the present case (subject to the point I will mention directly), it is clear that the respondents had ceased to be

owners at the time the expenses were incurred. They had abandoned to the underwriters, and been paid as for a total loss. The point, however, was made by the learned counsel for the appellant that, the vessel being sunk in that part of the River Ouse which was within the limits within which the Undertakers of the Aire and Calder Navigation were by statute authorized to make and had made improvements, it was not competent for the owners so to abandon her as to cease to be owners within the meaning of clause 47. No authority was cited for this proposition, and I am unable to see any principle on which it can rest. Many public bodies have had committed to them the improvement of public navigable rivers by dredging, by the erection of river walls, and in other ways; but the rivers do not thereby cease to be public navigable rivers or in any way change their character, nor can the rights of the public who navigate them, in the absence of statutory enactments, thereby become different from what they were before.

I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON (after stating the facts and the alternative claims made by the plaintiffs). My Lords, at present I make this observation upon the plaintiffs' alternative claims, that, whilst it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained, except by a court of summary jurisdiction, as is prescribed by s. 47.

Upon the assumption that the Courts below had jurisdiction to entertain all the questions raised in this suit, I see no reason to doubt that their decisions were right. Neither of the points pressed upon us by the appellant's counsel was of any substance, and they were consequently driven to rely upon assertion rather than argument. I am content to rest my opinion of the merits of the case upon the reasons assigned by Mathew J. and the learned judges of the Appeal Court.

As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought

H. L. (E.) 1897 BARRACLOUGH v. BROWN. Lord Watson.

before the Court in this suit, The only right which the undertakers have to recover from an owner is conferred by these words: "Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction." The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is pars judicis to notice, because it arises on the face of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing, the Court would be using a jurisdiction which the Legislature has forbidden it to exercise.

The appellant's counsel maintained that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under s. 47, a declaration that, under that clause, he has a right to recover from the respondents, who were admittedly the owners of the *J. M. Lennard* at the time when she sank. It is possible that your Lordships might accede to such a suggestion, if it were necessary, in order to do justice. But apart from the circumstance that such a declaration would not be in accordance with law, the substance of it is one of those matters exclusively committed to the jurisdiction of the summary court. In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature; and were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make could be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary jurisdiction conferred by the Legislature upon another tribunal.

I am therefore of opinion that the order appealed from ought

to be affirmed. It is in form correct, although my reasons for affirming are not the same with those which prevailed in the Courts below.

LORD SHAND. My Lords, for the reasons which have already been so clearly and fully stated, I also am of opinion that the judgment complained of should be affirmed.

I agree entirely with what has fallen from my noble friend Lord Watson on both points. It appears to me that the jurisdiction which can alone be exercised in a case of this kind belongs to a court of summary jurisdiction, and that therefore this suit could not be properly initiated in the court in which it has been brought. But further, I am clearly of the opinion, with all the judges who have considered the case, that on the merits of the question the appeal entirely fails.

LORD DAVEY. My Lords, I agree with your Lordships that there is no common law right of action in this case, and that the High Court had no jurisdiction over the subject-matter of this action under the Aire and Calder Acts, and that the appeal must consequently be dismissed.

I only desire to express my dissent from the contention of Sir Walter Phillimore, repeated by his learned junior, that although the High Court could not make any judgment or give any relief in this action, the Court might make a declaration binding the rights of the parties. In my opinion this is altogether wrong. The argument is founded on Order XXV. of the High Court Rules and Orders, which provides that the Court may make binding declarations of right whether any consequential relief is or could be claimed or not. The power of the Court of Chancery to make declarations of right without giving consequential relief was introduced by s. 50 of the Chancery Procedure Act 1852. That section did not contain the words in the present rule "whether any consequential relief is or could be claimed or not," and it was held by Kindersley V.-C. in *Jackson* v. *Turnley* (1), and Wood V.-C. in *Rooke* v. *Lord Kensington* (2), that it only enabled the Court to make declarations of

(1) (1853) 1 Dr. 617.

(2) (1856) 2 K. & J. 753.

H. L. (E.) 1897

BARRACLOUGH v. BROWN.

Lord Davey.

right in cases in which the plaintiff might have consequential relief if he chose to ask for it. The additional words were introduced in order to enlarge the power of the Court to make declarations in cases where from the nature or the circumstances of the case no substantive relief could be given by the Court. An example of such a case may be found in the case of *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1), and a familiar instance is when a declaration is sought as to future or reversionary rights, though the Court is very slow to make a declaration in such a case. But there is nothing whatever in the rule to enable the Court to make a declaration on a subject as to which its jurisdiction to give relief is excluded by statute. It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only, and must be so construed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 19, 1897.

Solicitors for appellant: *Pritchard & Sons, for A. M. Jackson & Co.*

Solicitors for respondents: *W. A. Crump & Son.*

(1) [1892] 3 Ch. 242.

Applied. HALL *v.* BECKENHAM CORPN. [1949] 1 All E.R. 423.

Applied. HALL *v.* BECKENHAM CORPN. [1949] 1 K. B. 716

[HOUSE OF LORDS.]

THE CHURCHWARDENS AND OVERSEERS OF LAMBETH PARISH . . } APPELLANTS;

AND

THE LONDON COUNTY COUNCIL . RESPONDENTS.

H. L. (E.) 1897 *July* 19.

Followed. BURNELL *v.* DOWNHAM MARKET U.D.C. [1952] 1 Q.B. 55

Followed. BURNELL *v.* DOWNHAM MARKET U.D.C. [1952] 2 Q.B. 55

Poor-rate—Rateable Value—Beneficial Occupation—London County Council—Public Park—London Council (General Powers) Act 1890 (53 *& 54 Vict. c. ccxliii.*) *ss.* 4, 5.

A county council, not charged with the duty of providing a park, were empowered by statute to purchase and accordingly purchased premises which by the statute were to be maintained by the county council as a park for the perpetual use thereof by the public for exercise and recreation. The necessary expenses of maintaining the park exceeded any sums which the council could derive from licences for the supply of refreshments therein or for grazing rights or otherwise :—

Held, that the county council were not rateable to the poor-rate in respect of the park, both because the park thus dedicated by statute to the use of the public had no rateable value, and also because the county council were not occupiers of the park for rating purposes.

The decision of the Court of Appeal, [1896] 2 Q. B. 25, affirmed.

The facts set out in the special case may be shortly stated as follows :—

The respondents, the London County Council, had been rated as occupiers of certain hereditaments and premises known as Brockwell Park, which had been acquired by them under the London Council (General Powers) Act 1890 (53 & 54 Vict. c. ccxliii.), upon a rateable value of 359*l*. By s. 4 of that Act it was in substance provided that the council might purchase Brockwell Park, and, when they had acquired it, they should hold the same and every part thereof as a park, and should lay out, maintain, and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation. The statute also enabled the council to inclose the lands for the better preservation thereof for public use and to adapt the buildings thereon for the public benefit, to erect lodges for the accommodation of keepers and others employed

H. L. (E.) 1897

LAMBETH OVERSEERS v. LONDON COUNTY COUNCIL.

in the maintenance and management of the park, and such other buildings as they might think requisite for refreshment-rooms, band-stands, and other conveniences. These powers were all strictly ancillary to the maintenance of the park in perpetuity for the use of the public. The necessary expenses of maintaining the park as a whole with the buildings on it, for the purposes of the Act, far exceeded any sums of money which were or could be derived from licences for the supply of refreshments in the park, or for grazing rights, or otherwise.

It was found in the case that, if the hereditaments assessed in the rate had remained in the same state of use and occupation in which they were prior to the passing of the Act, the rateable value thereof would have been sufficient to support the figures set out in the rate; and that, if the respondents had had a duty to provide an open space for the public in the locality, and, for the purpose of carrying out that duty, had had the power and the wish, instead of purchasing the park, to take it as lessees or tenants and pay a rent, they would have had to pay a rent sufficient to support the figures in the rate.

The Divisional Court held that the council were liable to be rated to the relief of the poor as beneficial occupiers of Brockwell Park, and ordered the case to be remitted in order that the beneficial value might be found, subject to certain limitations stated in the judgment. The Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.) reversed this decision, and held that the rate must be quashed. (1)

March 4, 5. *Lawson Walton Q.C.* and *Lewis Coward* for the appellants. The question is whether the property is capable of a beneficial occupation, and if it is whether it has an annual value. "Beneficial" means not profitable in a pecuniary sense, but of value. The occupation may be a burden to the occupier, and yet may be beneficial, as in the case of public bodies or trustees occupying under statute for public purposes exclusively, and deriving no profit: *Governors of Bristol Poor* v. *Wait* (2); *Mersey Docks* v. *Jones*. (3) It is

(1) [1896] 2 Q. B. 25. (2) (1836) 5 A. & E. 1.
(3) (1864) 11 H. L. C. 443, 501, 507.

said that the statutory restriction confining the use of the park to public purposes exempts from rateability. Property occupied under a private trust with a restriction would not be exempt, and there is no difference in principle between such a restriction and a statutory restriction. The duty of occupying and maintaining the park is imposed upon the council by statute, and they thought it worth while to contribute 60,000*l.* towards acquiring the freehold. The natural inference is that they would have given, if necessary, a substantial rent to obtain the same advantages. How can it be inferred as a matter of law that no person would give a rent for the park subject to the restriction? Many persons or bodies might be willing to do so for various reasons, philanthropic or otherwise. The fact that the council could not legally be tenants but must be owners does not prevent them from being taken into account as possible hypothetical tenants; and the fact that so long as the land is used for the statutory purposes the council are the only possible tenants does not prevent them from being assessable at the value it is to them: *London County Council* v. *Churchwardens, &c., of Erith.* (1) That the council can derive no profit is nothing; they have given a large sum in order to promote the interests of the neighbourhood, and to advance the objects for which they acquired the park. In the Court of Appeal it was admitted by the council that the property was rateable, but they contended that the rateable value was nil. That conclusion could only be justified by a finding of fact that no rent could be obtained; and that is not found as a fact. The inference from admitted facts is the other way. The land is not a barren rock "struck with sterility": the statutory restriction is a restriction on the occupier, not on the land. In *Greig* v. *University of Edinburgh* (2) Lord Cairns' judgment assumes that unless land is Crown property it must be rateable, and shews that the dedication to public purposes is no ground for exemption. It is enough "if the person to be considered as a tenant could reasonably be expected to take the premises from any motive": *Reg.* v. *School Board for London* (3), per

(1) [1893] A. C. 562. (2) (1868) L. R. 1 H. L., Sc. 348.
(3) (1886) 17 Q. B. D. 738.

H. L. (E.) 1897

LAMBETH OVERSEERS v. LONDON COUNTY COUNCIL.

Fry L.J. *Hare* v. *Overseers of Putney* (1) was relied on by the respondents: but there is a manifest difference. A bridge over which the public have a right to pass free from tolls is simply an uninclosed highway, and is no more rateable than any other highway. Here there is an inclosed and artificial park with pleasure-grounds and buildings, and into which the public have only a right to enter subject to restrictions and regulations. Moreover, Putney Bridge has no occupier.

[LORD HALSBURY L.C. Are the London County Council occupiers of this park?]

Certainly by their servants; and they let the refreshment-rooms and the grazing.

[They also referred to *Reg.* v. *Metropolitan Board of Works* (2); *Mayor, &c., of Burton-on-Trent* v. *Churchwardens, &c., of Egginton* (3); *West Bromwich School Board* v. *Overseers of West Bromwich* (4); *Harter* v. *Overseers of Salford* (5), per Blackburn J.; and Ryde's Rating Appeals (1886–1890), p. 207 (as to the rateability of empty houses and furnished houses).]

Bosanquet Q.C. and *Horace Avory*, for the respondents. The county council can only manage the park and spend money on it for the benefit of the public. Where a statute gives power to take tolls the value may be enhanced; on the other hand regard must be paid to restrictions imposed by statute just as much as to those arising from natural causes. The question is what was the value, not just before the park vested in the county council, but in 1894 after the vesting: what rent would a hypothetical tenant give for the park with such restrictions? In the *Erith Case* (6) there was a distinct finding that the county council would have paid a rent if they had not been owners. Here there is no such finding: the inference from the facts stated is that no tenant could have been found at any rent. Full effect must be given to the statutory restrictions in estimating the rent or whether any rent could be obtained: *Mayor of Worcester* v. *Droitwich*

(1) (1881) 7 Q. B. D. 223.
(2) (1868) L. R. 4 Q. B. 15.
(3) (1889) 24 Q. B. D. 197.
(4) (1884) 13 Q. B. D. 929.
(5) (1865) 34 L. J. (M.C.) 206.
(6) [1893] A. C. 562.

Assessment Committee (1), approving *Mayor of Liverpool* v. *Overseers of Wavertree* (2); *Altrincham Union* v. *Cheshire Lines Committee* (3); *Sculcoates Union* v. *Hull Dock Co.* (4) See also *Mayor of Lincoln* v. *Holmes Common* (5); and *West Bromwich School Board* v. *Overseers of West Bromwich.* (6) To be rateable the occupation must be beneficial: here as in the *Putney Bridge Case* (7) there is no beneficial occupation; in fact no occupation at all. The occupation must be exclusive: *Cory* v. *Bristow.* (8) Here the county council are caretakers at night, and the public in occupation by day. [Their Lordships relieved them from arguing the question as to the separate rateability of the lodge, &c.]

Coward, in reply. The public is excluded from part of the park always, and from the whole at night and at certain other times.

The House took time for consideration.

July 19. LORD HALSBURY L.C. My Lords, in this case the question is whether Brockwell Park is rateable, and if so, what is the principle upon which it is to be rated.

The facts which raise the question may be very simply stated. In 1891 the London County Council purchased the land and buildings which now form the park under the powers of an Act which cast upon them the perpetual obligation to maintain and preserve it, when purchased, as a park for the perpetual use of the public for exercise and recreation.

The special case goes on to state some other things, which appear to me to be irrelevant. We have nothing to do with the previous history of the seventy-eight acres of which Brockwell Park consists, nor are we concerned with the question whether it would be rateable if it were othewise held and enjoyed. The main question, and, indeed, as it appears to me, the only question, is whether it is now rateable at all, and I am of opinion that it is not. I do not think there is here a

(1) (1876) 2 Ex. D. 49.
(2) (1875) 2 Ex. D. 55, n.
(3) (1885) 15 Q. B. D. 597.
(4) [1894] A. C. 136.
(5) (1867) L. R. 2 Q. B. 482.
(6) 13 Q. B. D. 929.
(7) 7 Q. B. D. 223.
(8) (1877) 2 App. Cas. 262.

H. L. (E.) 1897

LAMBETH OVERSEERS v. LONDON COUNTY COUNCIL.

Lord Halsbury L.C.

rateable occupation by anybody. The "public" is not a rateable occupier; and I think that one sentence disposes of the case.

I think the *Putney Bridge Case* (1) is expressly in point, and I can draw no distinction between an artificial structure with a road over it for the use of the public and a park for the like purpose of allowing the public to go into it and use it. I think the *Putney Bridge Case* (1) was rightly decided, and I think it is strictly in point in this case.

The fact that the park is vested in the county council does not make them the occupiers. It would be absurd to contend that wherever the legal estate is there is occupation. A road is vested in someone, but, if a public road, there is no occupation of it any more than of a milestone or a direction-post.

I have hitherto dealt only with the question of occupation, and, as I have said, I think there is no occupation at all, the county council being merely custodians and trustees for the public. But I do not disagree with the reasoning of Smith L.J. and Rigby L.J. as to the rateability of an occupation where an occupation exists. No tenant would give anything for an occupation which would not give him a capacity to earn more than the rent which he is called upon to pay for it, and if the statute, as in this case, prevents him from earning anything, there can under the Parochial Assessment Act be no rateable occupation, as under that Act the rate is to be measured by the rent which a tenant would pay. It appears to me that the nature of the occupation here is such that there can be no rateable occupation in the sense in which those words are explained by many cases which it is not now necessary to refer to.

The law is, I think, now settled, and the case of the occupying owner, which has caused some confusion, is now clear enough, and upon this point also the *Putney Bridge Case* (1) seems to me in point. Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are in-

(1) 7 Q. B. D. 223.

capable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it.

It is hardly necessary to deal with the other point, if it can be called another point, in respect of the mansion-house and refreshment-rooms. They are and must remain part of the park, and are no more capable or in fact subject to different considerations than the park itself. They are and must be part of the park. They cannot be separated from it, and are within the principle which I have already explained.

For these reasons I think that the appeal ought to be dismissed and the judgment of the Court of Appeal affirmed.

LORD HERSCHELL. My Lords, the question raised in this case is, whether the respondents are liable to be rated as occupiers of a public park, which is vested in them solely for the purpose of maintaining it for the use of the public. [His Lordship stated the facts above given.]

In order to determine whether the respondents are liable to be rated in respect of the park and its adjuncts, the question which has to be answered is, at what rent, if any, the hereditaments might reasonably be expected to let, taking one year with another. Now, it is well settled that, in answering this question, regard must be had to any restrictions which the Legislature has imposed upon their use, and the hypothetical tenant must be supposed to take them subject to these restrictions. Bearing this in mind, it seems clear that the park and the buildings thereon can have no rateable value. No tenant would give anything for them, seeing that every part of them is dedicated to the public use, and that the small sums of money which might be received in respect of them would, as the case finds, be more than absorbed by the expense of keeping them in order. It was argued, however, for the appellants that, on the authority of the *Erith Case* (1), the respondents ought to be considered as among the possible hypothetical tenants, and that, as they made a considerable contribution towards the cost of purchasing the park, they would have been willing to pay a rental for its use. In my opinion, the *Erith Case* (1) has no application. The land

(1) [1893] A. C. 562.

H. L. (E.) 1897

LAMBETH OVERSEERS v. LONDON COUNTY COUNCIL.

Lord Herschell.

on which the pumping-stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. The London County Council could place their pumping-stations where they pleased; they could remove them elsewhere at any time they thought fit, or dispense with them altogether, if they adopted some other method of dealing with their sewage, and could sell or let the land to a tenant whose use of it would be unrestricted. About the rateability of the land there could be no real controversy. The only question was, what was its rateable value, and whether the county council could be taken into account in inquiring what the hypothetical tenant would give. It was held that they might, inasmuch as their statutory duties imposed upon them the obligation to provide for the disposal of the sewage. Here these very lands and every part thereof, by statute, must be held in perpetuity for the use of the public, and the question is, whether, under these circumstances, they are rateable at all. I think that on principle they are not. And the Putney Bridge case, which, in my opinion, was rightly decided, is not distinguishable from that under consideration. Moreover, I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public. This was the view taken by some of the learned judges in the Court of Appeal with regard to the position of the county council in relation to Putney Bridge. I concur in the view they expressed, and, in my opinion, it is equally applicable to Brockwell Park. For these reasons, I think the appeal should be dismissed.

LORDS MACNAGHTEN and MORRIS concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 19, 1897.

Solicitor for appellant: *R. Honey.*
Solicitor for respondents: *W. A. Blaxland.*

[HOUSE OF LORDS.]

THE KENT COUNTY COUNCIL . . . APPELLANTS; AND LORD GERARD . . . . . RESPONDENT.

H. L. (E.) 1897 July 23.

Highway—Excessive Weight or Extraordinary Traffic—"Person by whose Order such Weight or Traffic has been conducted"—Highways and Locomotives (Amendment) Act 1878 (41 & 42 *Vict. c.* 77) *s.* 23.

The respondent contracted with several persons for the delivery to him of materials required for his residence, the prices including carriage to be payable and the property in the materials to pass on delivery and acceptance at his residence. The materials were conveyed by a certain highway. The respondent knew that the contractors intended to send the materials by that highway by traction engines and trucks, but he did not employ or pay the carriers or give directions as to the route or the mode of conveyance. Extraordinary expenses having been incurred by the highway authority by reason of the damage caused by excessive weight passing along the highway or extraordinary traffic thereon, within s. 23 of the Highways and Locomotives Amendment Act 1878:—

Held, that the respondent was not a "person by whose order such weight or traffic had been conducted" within the meaning of that section, and that he was not liable for the expenses.

The decision of the Court of Appeal, [1897] 1 Q. B. 351, affirmed.

THE respondent contracted with several persons for the delivery to him of materials required for improvements at Eastwell Park, his residence. The prices including the carriage were to be payable by and the property in the materials was to pass to the respondent on acceptance and delivery to him at Eastwell Park. The materials were conveyed by traction engines and trucks over the Faversham and Ashford main road on which Eastwell Park was situated. The respondent knew that the contractors intended to send them by this road by traction engines and trucks, but he did not employ or pay the carriers or give directions as to the route or the mode of conveyance. The surveyor certified under s. 23 of the Highways and Locomotives Amendment Act 1878 that extraordinary expenses had been incurred by the highway authority in

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD.

repairing the Faversham and Ashford main road by reason of the damage caused by excessive weight passing along that highway or extraordinary traffic thereon, and the appellants issued a summons against the respondent under that section for the recovery of the expenses incurred by them in repairing the highway. The court of petty sessions held that the respondent was in the words of s. 23 a "person by whose order such weight or traffic had been conducted," and adjudged that he was liable to pay the appellants 750*l.* for damages with costs. The court of quarter sessions reversed the decision of the petty sessions and dismissed the complaint with costs, stating a special case for the opinion of the Court. The Queen's Bench Division (Cave and Wills JJ.) reversed the decision of the quarter sessions and restored the decision of the petty sessions with costs. The Court of Appeal (Lord Esher M.R. and Rigby L.J., Lopes L.J. dissenting) reversed the decision of the Queen's Bench Division and restored the decision of quarter sessions with costs. (1) The evidence set out in the special case is sufficiently referred to in the judgments.

July 22. *Asquith Q.C.* and *R. M. Bray* (*G. F. Hohler* with them) for the appellants. The traffic was extraordinary, and it was conducted by the order of the respondent within the meaning of s. 23 of the Act. That it was "extraordinary" in the statutory sense, both by reason of excessive quantity and of the purpose for which the materials were destined is not disputed. It clearly falls within the definition of Bowen L.J. in *Hill* v. *Thomas* (2): "Such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair." The authorities are examined by Cave J. below, and it is only necessary to refer to two of them. In *Williams* v. *Davies* (3) it was held that the person liable is the person who orders the goods, whether they are carried by his own or the contractor's wagons. The respondent must be held to have known that these materials

(1) [1897] 1 Q. B. 351. (2) [1893] 2 Q. B. 333.
(3) (1880) 44 J. P. 347.

could only be conveyed in heavy traction engines, and that there was only one road by which they could travel. Thus the case is essentially different from *Lapthorn* v. *Harvey* (1) in which the sub-contractor ordered the mode of carriage, and there was nothing in the contract specifying how the goods were to be conveyed. In that case the sub-contractor and not his principal was held liable.

[LORD HERSCHELL. Would there be any liability if at a particular time the whole traffic was "extraordinary," but no single person exceeded ordinary limits ?]

No one would be liable. A crowd walking might make the traffic excessive. The causa causans must be in a single will. The sole question is "What is ordered?" It is clear that the respondent ordered what amounted to "extraordinary traffic." The true principle is expressed by Lopes L.J. below. The person who gave the initial order is liable; all that was done afterwards was the natural and inevitable result of that order.

Channell Q.C. and *G. Edwardes Jones* for the respondent were not heard.

July 23. LORD HERSCHELL. My Lords, the only question that arises in this case is whether Lord Gerard was a person by whose orders certain extraordinary traffic had been conducted along a highway within the meaning of the Highways and Locomotives (Amendment) Act 1878.

The facts are these. Lord Gerard was making considerable alterations on his estate in Eastwell Park and in the dwelling-house which existed in that park. He entered into contracts with certain persons for the supply of materials. Under all those contracts the materials were to be supplied to him at a certain price at Eastwell Park. With the mode in which the materials were brought there he had nothing to do. The goods whilst they were being conveyed there were not his goods, and no property passed or could pass to him until delivery at Eastwell Park. Lord Gerard did not employ the persons who conveyed the goods there, and he did not pay them for such conveyance. What he did was to buy the goods which were

(1) (1885) 49 J. P. 709.

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD. Lord Herschell.

brought to Eastwell Park, and to pay a certain price for them delivered at Eastwell Park.

Now, my Lords, the surveyor has found, in pursuance of the provisions of s. 23 of the Act to which I have alluded, "that extraordinary expenses had been incurred by reason of excessive weight passing along the highway or extraordinary traffic thereon." The question then arises whether Lord Gerard is the person by whose order such weight or traffic had been conducted along the highway.

My Lords, there are various persons who might be mentioned connected with the conveyance of traffic along a highway about whom everybody would be agreed that traffic was conducted by their orders. I do not propose to define those persons; I do not propose even to give illustrations (which will occur to everyone) of the persons to whom those words would apply, because I might be misunderstood as limiting the persons coming within the section to those whom I gave as illustrations; and as it would be impossible or inexpedient to give an exhaustive definition of the persons by whose orders the traffic would be conducted within the meaning of the section, I think it better not to attempt to give any definition at all. All your Lordships have to consider is whether Lord Gerard was the person in the present instance by whose orders this traffic was conducted.

My Lords, it is contended on behalf of the appellants that he is that person, inasmuch as it is said that he ordered these goods which were to be delivered at Eastwell Park, and that order involved the necessity of bringing the goods to Eastwell Park, and therefore he was the person by whose order these goods were brought and the traffic so conducted.

My Lords, the word "order" is, of course, ambiguous in the sense in which it was used by the learned counsel in the proposition to which I have just called attention. It is, no doubt, a word in frequent use with reference to the supply of goods by a tradesman, but even then it is used in different senses. If I give an order (as it is called) to a tradesman for the supply of certain goods, I may have previously received a communication from that tradesman which will make my so-called "order"

the completion of a contract, and will impose on him the obligation of supplying those goods. On the other hand, I may give an "order" (using as it is commonly used, precisely the same word) to a tradesman for the supply of goods, and that order imposes no obligation on him at all; he is entitled, if he pleases, to do nothing upon it, because my order does not of itself create any contract until he has accepted it, and agrees to supply the goods I have ordered. Therefore the word "order" is frequently used with reference to ordering goods from tradesmen in a sense that cannot be called strictly legitimate, because it means an order which is no order; it imposes no obligation; there is no liability for disobedience to it, and no duty to obey it. But the argument on behalf of the appellants is this: then, whenever a person orders goods from a tradesman in either of the senses to which I have referred—and I will assume in the present case that the order was given in the former sense, although I am not quite certain that it was so in every case—then if that order involves the conduct of extraordinary traffic along a highway, the person who gave that order or direction to the tradesman is the person by whose order the traffic is conducted along the high road. My Lords, I do not think that is the natural meaning to give to the words of the section. The contention seems to me necessarily to go this length—that whenever I enter into a contract for the supply of goods, and the performance of that contract involves the carrying of an extraordinary weight by any person along any highway, that traffic is conducted by my order within the meaning of the section. I do not think it is possible to stop short of that. In the course of the argument I pointed out the length to which such a proposition would carry you. It seems to me that this would be altogether an unreasonable construction of the section, and I do not think it is a legitimate construction, having regard to the language used.

I observe that the learned judges in the Court below, who have been in favour of the appellants' view, have altered the words of the statute in describing the transaction. Cave J. alters the word "by" into the word "at"—"at whose order." Lopes L.J. for the word "by" substitutes "in consequence

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD. Lord Herschell.

of." The simple answer is that is not what the statute has said. The statute has said, "by whose order the traffic is conducted," and if the person sought to be charged has had nothing to do with the conduct of the traffic or the mode in which it is to be conducted, and has had no power to give orders in relation to it or in reference to it, then, I think, it is impossible to say that it was by his order that the traffic was conducted. That really is the short ground on which I decide this case.

It has been suggested that, if this construction be the correct one, there might be extraordinary traffic along a road induced by the act of a particular individual who is building a house, for example, and if that traffic were distributed amongst several people owing to the orders being given to several different people for the goods, then, notwithstanding that there was extraordinary traffic, there would be no person who could be rendered liable for the injury caused by that extraordinary traffic. My Lords, that may be true. On the other hand, if the words "by whose order the traffic was conducted" were referred to the person who gave the orders for the goods, you might have a man in business conducting a large traffic distinctly under his orders along a highway, and the several persons for whom he was building houses, for example, having only ordered an amount of goods the carriage of which would not lead to extraordinary traffic, they would be under no liability.

It was suggested that under the terms of this section, both the person by whose order the traffic was conducted in the strict sense of the word would be liable, and also the person whose purchase of the goods led to the excessive traffic. My Lords, I think there would be considerable difficulty in working out the rights of the parties upon such a construction of the section; but the objection which I take to it is this: in that case you would be interpreting the words "by whose order the traffic was conducted" in two entirely different senses, one as it seems to me the proper and natural sense, the other a strained and unnatural sense. The truth is that the contention of the appellants amounts to this—that "*by whose order* the traffic is conducted" must be interpreted as meaning "at whose instance"

or "for whose benefit" the traffic is conducted. That might or might not have been expedient legislation, but at any rate, to my mind, that is not the legislation to be found in the enactment. I think it is quite possible that some of the cases which the Legislature would have desired to cover by an enactment of this description are not covered by the language used. That is not an unknown experience in legislation. Certain obvious cases occur and are intended to be met; other cases which might seem to fall within the same principle are found not to be met, the language being limited to those which were in view at the time the enactment was drawn.

My Lords, it would not be legitimate, in my opinion, to strain the language used in order to make it apply to a case to which it does not legitimately, in its terms, apply, on account of the supposed intention of the Legislature and the theory that that supposed intention can only be effectually carried out by giving to the words a meaning which they do not naturally bear.

For these reasons I think that the judgment of the Court of Appeal must be affirmed and the appeal dismissed.

LORD WATSON. My Lords, the special case stated by the court of quarter sessions for the Eastern Division of the County of Kent submits for decision a single question of law arising upon the construction of s. 23 of the Highways and Locomotives (Amendment) Act 1878. I have had little difficulty in arriving, with the rest of your Lordships, at the conclusion that the question ought to be answered in the affirmative.

It must be assumed, as matter of fact, that extraordinary expenses to the amount of 750*l.* have been incurred by the appellants in the repair of the Faversham and Ashford main road, from its junction with the London and Dover main road at Faversham to the lodge-gate entrance to Eastwell Park, in consequence of the damage caused by reason of excessive weight passing along the same, and of extraordinary traffic thereon. The traffic in question, whether excessive in weight or extraordinary in the sense of its being beyond the ordinary requirements of the district, consisted of materials conveyed along the Faversham and Ashford main road, in locomotives or in wagons

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD.

Lord Watson.

hauled by locomotive power, to Eastwell Park, where they were used in improvements executed upon his estate by the respondent, Lord Gerard. Sect. 23 enacts that the appellants may recover these extraordinary expenses, in a summary manner, "from any person by whose order such weight or traffic has been conducted."

The court of quarter sessions held that the respondent was not, within the meaning of the statute, a person by whose order the excessive weight or traffic which did damage to the road had been conducted. A Divisional Court, consisting of Cave and Wills JJ., quashed the order of the quarter sessions, and restored an order of the petty sessions, by which it had been adjudged that the respondent should pay to the appellants the said sum of 750*l.*, with costs. In the Court of Appeal, the Master of the Rolls and Rigby L.J. (Lopes L.J. dissenting) reversed that judgment, and affirmed the finding of the quarter sessions.

It now becomes necessary to notice those findings of fact in the special case, which tend to explain the connection which the respondent had with the traffic which has given rise to the appellants' statutory claim. The substance of these findings admits of being shortly stated. The respondent contracted with several persons or firms for the delivery to him, at Eastwell Park, of the various materials required for his improvements, the price being payable by him, on the acceptance of such materials as were according to sample, and including all claims of the sellers for carriage to their destination or otherwise. The property in these materials did not pass to the respondent until they were examined and delivery accepted at Eastwell Park; and he neither employed, nor incurred any liability to, the carriers by whom they were conveyed to that destination. The respondent was aware that it was the intention of the parties who had undertaken to supply the materials to forward them by the Faversham and Ashford main road; but it has not been expressly found, and it does not appear to me to be matter of reasonable inference from any of the facts found, that the forwarding of the materials by that route was made a term of any contract for their supply so that

the respondent could have declined to accept them if they were sent from another place than Faversham or by a different route. On the other hand, I think it clearly appears that the respondent had no right to interfere either with the goods themselves or with the persons by whom they were conveyed along the road which is under the jurisdiction of the appellants.

The single point arising for decision in this appeal is whether in these circumstances the conveyance of the materials or their conduct along the appellants' road was ordered by the respondent, within the meaning of s. 23. The words of the clause must be construed according to their ordinary signification, unless the context of the statute is sufficient to shew, in the first place, that some other meaning was intended, and, in the second place, what that other meaning was. Nor does it appear to me to be doubtful that in cases where the order is not said to have been given by the owner who is forwarding the goods, or by the person whom he has employed to carry them, but by the purchaser to whom the goods are to be delivered at the end of their transit, who, until they reach that point, has no interest in them, the latter cannot, in the ordinary sense of the words, be said to have ordered their conduct by a special route, unless he has interfered and given instructions to that effect which have been obeyed, or has made it part of his contract with the seller that the goods shall be forwarded by that route and no other. To construe the words otherwise would, in my opinion, be as unreasonable as to affirm that a person who ordered goods of a tradesman for acceptance on delivery had also given orders as to the route by which they were to be sent, if he happened to know the road to his house, which must be used, or was invariably used, by the tradesman's cart.

The learned Lord Justice, who formed the minority of the Appeal Court, appears to have arrived at a different result from his brethren of the majority, by reading the word "order" as it occurs in s. 23 as signifying, not an order given with respect to the conveyance of goods either to a contractor for their supply, or to his carrier, but the initial order given to the contractor which led to his sending the goods, and employing a

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD. Lord Watson.

servant or carrier to convey them. The Legislature is, no doubt, competent to enact such a provision; but it would be a novel rule to make a person who has contracted to purchase goods, if they are found according to sample, responsible for all orders given with respect to the conveyance of the goods before they are delivered to him if he happened to be aware that these orders would be given. With that matter the purchaser has really no concern. I am by no means satisfied that an enactment imposing liability upon the originator of the work for orders given by persons independent of him, in relation to the carriage of materials which they had undertaken to deliver, would be to the advantage of the road authority. One contractor for building materials or their carriage may be employed by fifty or a hundred different persons; and if he has actually ordered their transport by a particular road, he will be liable for all the damage done to the road if the traffic be excessive in the sense of the Act. But if the liability rested on his employers, each and all of them might escape on the ground that the amount of his carriages were not per se excessive or productive of damage. I entertain a strong objection to any canon of construction which introduces by implication into a statutory clause qualifying expressions which are not there, and alters the plain meaning of words which are to be found in it. I may add, that in my opinion the intention of the Legislature must be inferred from the language which it has used: and that whilst I have been unable to discover for myself, the appellants' counsel did not attempt to direct my attention to, any context which gives a colour to the interpretation suggested by Lopes L.J.

I therefore concur in the motion that the order of the Court of Appeal be affirmed with costs.

LORD SHAND. My Lords, I am also of opinion that the judgment of the Court of Appeal should be affirmed and the appeal dismissed.

In regard to the facts of the case, I think it only necessary to say that it appears from the special case stated by the justices that Lord Gerard, in making his arrangements for the

building of an addition to his house, stipulated with every one with whom he dealt that the materials which were to be brought to that house and ground should be purchased, and that these materials were purchased, at a price which included delivery. In no case did Lord Gerard himself by his servants conduct any traffic upon the road in question, nor did he, by hiring wagons or engines to go along the road, himself use the road in any way. Nevertheless, it is said that by virtue of the provision in s. 23 of the statute he is responsible for the result to the road of the extraordinary traffic that passed over it.

Now, my Lords, I think with your Lordships that there is nothing in the language of this statute which would warrant the imposing of liability in such circumstances. It is a condition of liability upon any one that the surveyor shall issue his certificate to the effect that "extraordinary expenses have been incurred" "in repairing such highway by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon." The question here is, if such a certificate is issued, on whom does the liability rest? My Lords, it is, I think, at once to be observed that the clause which follows does not say that the liability is to rest upon him who has caused the extraordinary traffic to be there. It is not that the liability shall rest upon him at whose instance, or for whose benefit, that traffic has been initiated. It is not even, as Lopes L.J. read it for the purpose of supporting his ground of judgment, that there should be liability upon the person "*in consequence of whose order*" the traffic has been carried on. The words used in the statute are these—that the expenses shall be recovered "from any person *by* whose order such weight or traffic has been conducted." My Lords, one would naturally expect to find, in a provision of this kind, that the person who really used the road and conducted the traffic should be responsible for the result; and for my part I read the statute as meaning that, and nothing less or more. A large contractor or other person with vans or carts and traction-engines which are used does not work those vans or engines personally. He (or it may be a company) gives orders to

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD. Lord Shand.

servants, to the persons in his employment, to conduct the traffic. The words of the statute seem to me to fit that very case. The additional expense rendered necessary for the repair is to be recovered "from any person by whose order such weight or traffic has been conducted." That appears to me to indicate or apply to the master who has himself ordered his servants to conduct the traffic on the road. So far as I can see, there is no recondite or secondary meaning to be attached to the words "by whose order." I agree with my noble and learned friend who has last spoken, Lord Watson, that you must take those words in their ordinary and natural signification, and, taking them so, I think they lead to the result I have now stated. I think you cannot fairly interpret these words "by whose order" by referring them to some one who has made a contract which led somebody with whom he contracted to give orders to conduct traffic on the road. The contractor or contractors who by himself or his servants in fact conducted the traffic is, in my opinion, the person or company liable under the statute.

Upon these grounds I am of opinion that the interpretation which was put upon this clause by the Divisional Court, and which had some sanction in one of the previous cases, is not sound, and I agree in the view which has been taken by the majority of the Court of Appeal, being of opinion that the true interpretation of the statute is that which I have endeavoured to explain.

My Lords, it was argued that Lord Gerard was aware that the materials must come by this road in the fulfilment of the contracts he made. Indeed, it was suggested that the contracts might be read as if he had so stipulated. I agree with my noble and learned friends who have spoken that the facts do not warrant any such observation. It was no term of the contract with Lord Gerard that the materials should come by that road; but for my part I am not prepared to say, even if there had been in the contract with Lord Gerard a stipulation that the materials should be brought by that road, that this would be, in a sense within the meaning of the statute, a conducting of the traffic by his order. I think that the person

who conducts the traffic, or gives his orders to his servants to conduct it, is the person who is liable under the statute.

Again, my Lords, it was said that if this reading of the statute were adopted, as it must now be, mischief would result which was not anticipated. It was said that there would be a great deal of traffic which would wear out roads, and for which there would be no means of recovering the cost of repair. I confess I can scarcely see that this evil or mischief will occur, or if it does, it appears to me that it must be in a very limited degree. If there be any extensive work going on for which a road of this kind is used, and several contractors are using it each to a certain extent, and the surveyor gives his certificate that there has been extraordinary traffic, if it appears that two or three different persons have contributed to a material extent to the injury of the road, I can see no reason why an action should not lie against each of those persons in respect of his contribution to the injury; and, therefore, the hardship suggested in this supposed case does not appear to me to have any substance.

For these reasons, my Lords, I concur in thinking that this appeal ought to be dismissed.

LORD DAVEY. My Lords, I cannot doubt that the judgment of the Court of Appeal in this case ought to be affirmed.

The question is, "by whose order" was the traffic conducted? I am of opinion that primâ facie the traffic was being conducted by the order of the person to whom the goods at the time being belonged, at whose risk and under whose control those goods were being carried, and not the less so because the goods were being carried by a merchant in pursuance and in performance of a contract of sale and delivery to a purchaser at another place. My Lords, in such a case the goods when on their way to the place of delivery are at the risk and under the control of the vendor, and I do not think in the ordinary use of language the traffic can be said to be conducted by the order of the purchaser, though no doubt the goods are being so carried in consequence of his order.

My Lords, it appears to me that Lopes L.J. in his dissenting

H. L. (E.) 1897 KENT COUNTY COUNCIL v. LORD GERARD. Lord Davey.

judgment puts very clearly the points upon which I venture to differ from him. He says in the course of his judgment: "Is it to be said if I order a truck of coals from a coal merchant, and his waggons, owing to the excessive weight of the coals, do damage, that the damage is to be attributed to the order given to his carter by the coal merchant and not to my order, which is the effective cause of any action being taken by anybody?" My Lords, with great deference to the Lord Justice, I answer that question Yes, it is so to be said if the test of liability is to be by whose order the traffic is being conducted.

My Lords, the learned Lord Justice subsequently says: "I read 'by whose order' as if it was 'in consequence of whose order.'" I do not think that that is a legitimate change of the words used in the Act, and I do not think that Lush J. and Bowen J., as he then was, in the case which has been referred to, *Williams* v. *Davies* (1), so read the Act. At any rate, I think it is a wrong reading of the Act; and, therefore, I think that the appeal ought to be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 23, 1897.

Solicitors for appellants: *Prior, Church & Adams, for Warner & Turner, Maidstone.*

Solicitors for respondent: *Meynell & Pemberton.*

(1) 44 J. P. 347.

[HOUSE OF LORDS.]

THE GUARDIANS OF THE POOR OF THE WEST DERBY UNION . . . } APPELLANTS;

AND

THE METROPOLITAN LIFE ASSURANCE SOCIETY AND OTHERS . . . } RESPONDENTS.

H. L. (E.) 1897 July 23.

Poor Law—Guardians of the Poor—Loan for Term of Years—Redemption without Consent of Lender—Poor Law Loans Act 1871 (34 & 35 *Vict. c.* 11) *s.* 2.

Guardians of the poor who have since April 24, 1871 (the date of the passing of the Poor Law Loans Act 1871) borrowed moneys, to be repaid at stipulated times, cannot even with the authority of an order of the Local Government Board under s. 2 of the Act, compel the lender to accept against his will repayment otherwise than in accordance with the contract.

The decision of the Court of Appeal, [1897] 1 Ch. 335, affirmed.

THE following facts were stated in a special case:—

The appellants, acting under various Acts including the Union Loan Act 1869 and under the authority of the Local Government Board, borrowed in 1876, 1877, and 1878 from the respondents various sums amounting to 30,000*l.* at 4¼ per cent. These loans were secured by a mortgage of the common fund of the union, and were to be repaid by equal half-yearly instalments extending over thirty years. Similar loans were afterwards made.

In 1895 the appellants, being able to borrow at a lower rate of interest, obtained from the Local Government Board an order under the Poor Law Loans Act 1871 authorizing the appellants to redeem the balances of the above loans, and for that purpose to borrow such sums as might be necessary at 3 per cent. The respondents having declined to accept repayment of their loans before the stipulated times the appellants brought an action against them claiming a declaration that they were entitled to pay off and redeem.

North J. held that the appellants were entitled on May 20, 1896, to pay off and redeem all the loans in question without the

H. L. (E.) 1897

WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY.

respondents' consent. The Court of Appeal (Lindley and Rigby L.JJ., A. L. Smith L.J. dissenting) reversed this decision and made an order declaring that the appellants were not entitled without the respondents' consent to redeem any of the loans; and that the respondents were entitled to the repayment of the loans by the instalments and in the manner provided by the instruments referred to in the special case, notwithstanding the order of the Local Government Board of September 21, 1895; and that the respondents were notwithstanding that order entitled to insist upon the due performance of the contracts between the appellants and respondents. (1)

Cozens-Hardy Q.C. and *Swinfen Eady Q.C.* (*R. J. Parker* and *W. E. Cleaver* with them) for the appellants. Upon the true construction of s. 2 of the Poor Law Loans Act 1871 the appellants having obtained the order of the Local Government Board in September 1895 were enabled to redeem the balances of the loans, with or without the consent of the respondents, inasmuch as the loans, having been made after the Act came into force, were made in contemplation of the Act and of the right of redemption conferred by s. 2. If this be not the true construction it is difficult to see how the Act, passed in view of a probable fall in the value of money, and with the object of giving public bodies the benefit of such fall, could have any operation. The proviso at the end of s. 2 implies that loans made after the Act may be repaid without the consent of the lender: otherwise it has no meaning at all.

[They referred to the Poor Law Amendment Act 1834 (4 & 5 Will. 4 c. 76) ss. 23, 24; the Poor Law Loans Act 1836 (6 & 7 Will. 4 c. 107) s. 1; the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) s. 8; the Poor Law Amendment Act 1866 (29 & 30 Vict. c. 113) s. 8; the Poor Law Amendment Act 1868 (31 & 32 Vict. c. 122) s. 35; and the Union Loans Act 1869 (32 & 33 Vict. c. 45) ss. 4, 6.]

Sir R. T. Reid Q.C. and *Danckwerts* for the respondents were not heard.

(1) [1897] 1 Ch. 335.

LORD HALSBURY L.C. My Lords, I cannot help thinking that the argument in this case, although it has occupied some time, is comprehended in a very narrow space. The question is simply as to the construction of the statute. The statute was dealing with persons who were not under a complete capacity either to borrow or to raise money. When they did borrow money they were under particular terms which deprived them of the power of doing anything but that which was authorized by the statute under which they were acting. Let me expand that proposition: they had power to borrow, and they had power to spread the repayment of the money so borrowed over a certain number of years. For obvious reasons the Legislature has for a long time adopted the same policy as to such loans, and it is this: the ratepayers, being a shifting body, ought not to be called upon to pay the whole sum of money which is applicable to local purposes at one time. For that, among other reasons, the Legislature has been careful that where money is sought to be expended by public bodies it shall be so borrowed that the repayment shall be spread over a large number of years. If under the original policy of the Act a very large sum of money was borrowed, and had to be paid off at once, it might be that one set of ratepayers would be called upon to pay for some of the advantages which would accrue to other persons, long after they had left the neighbourhood and when they had no relation to the particular place in which the money had been expended. Whether that is a successful policy or not it is immaterial to inquire. That appears to have been the policy of the Legislature. At all events, for some reason or another the particular body now in question, who owe their creation to the Act of 1834, were under those disabilities.

The Act, which we are now construing, of 1871 was passed to enable them, by a fresh loan, to pay off at an earlier period the money they had borrowed. Up to that time, so far as I can see, they had no power to do that. However, the Legislature then said that they may do that if they can, and (this is the important part of the new power given) they may make a rate to raise the money for that purpose. Up to that time

H. L. (E.) 1897 WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY. Lord Halsbury L.C.

they had no such power. They were under an incapacity; but in 1871, for the first time, the Legislature gave them the power to do that. I say nothing about the necessity of the sanction of the Government Department, because it seems to me to be irrelevant for the present purpose; but they received the power to do that.

It is said now that they also received the power, apart from the particular contract which they had entered into and apart from what may be regarded as the ordinary course of law, compulsorily to alter the terms upon which they had obtained the money, and as against the lender to say, "Now we will pay you off at once." It emphasises, of course, the injustice of that when it is said that the value of money may have very much decreased, and that they could get money on much cheaper terms. Be it so; but then the bargain of the person who lent the money was that it should not be paid off at an earlier period in order to reduce the amount of interest that was payable thereon. That is the injustice which such an enactment would inflict. To my mind, whatever may be the policy of such a course of procedure, I concur with what has been said, I think very pointedly, by Rigby L.J., that, although apparently and at first sight not taking account of what might be the ordinary politico-economical view of such questions it might seem to be to the advantage of the ratepayers to do this —yet upon a somewhat wider view of the question it might very well be that it would operate injuriously if the loans to these bodies were subject to such terms, and the lender of money were liable to have his interest so compulsorily reduced contrary to what the bargain was or might have been in the first instance, when he might have considered the whole value of the period that would be embraced during which a high interest was to be paid. If this is a power to be given, and which he understood at the time, he probably would require a very large interest in order (treating money as a marketable commodity) to provide against such a contingency happening. Therefore I am not prepared to say that it would be for the interest of the ratepayers that such a power should be given. But, after all, that is outside, and is a mere speculation. I do

not pronounce any opinion one way or the other upon it—it may or may not be to the advantage of the ratepayers.

After all, the question must come back to the point whether or not that power has been given, and that turns upon the exact language. For my own part, notwithstanding all that has been said about it, it appears to me to come back to the construction of comparatively simple words; and I do not think I can add anything to what Rigby L.J. has pointed out. It seems to me, in his very able and exhaustive analysis of what the Act of Parliament itself has done, he has disposed of every question. I agree with him that there are no affirmative words giving any such power. I agree with him that when you look at the language in which whatsoever power there is is conveyed, it seems to exclude any such power. It is strictly an enabling Act to give a capacity where the capacity did not exist before; and to take the language of what is called the proviso as I read it, emphasising the word "such" in it, it means this: that whatever you may do in this respect by reason of these new powers given you, you shall not raise a loan by rates for the purpose of paying off any of your loans which were contracted before 1871. That is the only meaning which I can give to the proviso, and that I think is the meaning of the proviso.

Up to a late period of the argument I do not think I had apprehended that the proviso could have had any operation at all. But when one looks at the word "such," it may very well mean that power is given to pay off loans; but you shall not use your new powers given you to pay off any loans which were contracted before the year 1871. That gives a meaning to the proviso, and, as I have more than once said in the course of the argument, I cannot find any other meaning. It satisfies the words, whilst the other view gives to the proviso a meaning which I think would be most formidable, not merely with reference to the question which now is under debate before your Lordships, but also as a matter of construction, that a proviso could be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the

H. L. (E.) 1897 WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY. Lord Halsbury L.C.

previous words of the section itself. My Lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an Act of Parliament or anything else, has ever been construed, and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso.

My Lords, for these reasons I am of opinion that the judgment of the Court of Appeal was right, and that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. My Lords, I agree. The only question raised by this appeal lies in a nutshell. The appellants seek to read the provisions of s. 2 of the Poor Law Loans Act of 1871 as if they conferred upon the Poor Law Board, now the Local Government Board, power to give authority to a union which has borrowed money upon a security extending over a term of years to redeem as against a creditor who is unwilling.

My Lords, if such an authority were conferred upon the Local Government Board by s. 2, I admit that, as has been represented in the argument of the appellants, the proviso upon that clause might be read as signifying that in the case of loans which were outstanding at the date of the Act, no such power could be given without the consent of the creditor, but that in all other cases that consent might be given by the Local Government Board against his will and desire. But I can only say for myself that, laying out of sight the words of the proviso, I cannot discover any language in s. 2 which either expressly or by reasonable implication confers any such power as against an unwilling creditor upon the Local Government Board.

Now that being so, what is the meaning of the proviso? I have not been able to satisfy my own mind that it can be read or ought to be read in the sense suggested by Rigby L.J., which has met with the approval of my noble and learned friend the Lord Chancellor; but I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one

regards the natural history and object of provisoes, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words. I therefore concur in the judgment which has been moved.

LORD HERSCHELL. My Lords, I am of the same opinion. Apart from the proviso to be found at the end of the 2nd section of the Act of 1871, I do not think it would have been possible to contend that the guardians in the present case had, even with the sanction of the Poor Law Board, now the Local Government Board, power to redeem against the will of the lenders of the money. The earlier part of the section deals merely with the sanction which it is necessary that the guardians should obtain before exercising such powers as the enactment gives them. It is purely, as I have said in the course of the argument, a domestic question. They may not without that sanction even do that which the statute enables them to do, because the obtaining an order in that behalf is the first step towards putting them in a position to do the act which the Legislature empowers them to do, and I think, for the reasons given by Rigby L.J., it is impossible to construe the words "*enable* to redeem" as doing anything more than giving a sanction to their doing or authorizing their doing that act as between them and the Local Government Board.

The truth is, my Lords, that the exigency of the argument for the appellants requires that there shall be read into the statute such words as these: "they shall have a right at any time, notwithstanding anything in the contract of loan contained, to redeem the balance of the loan." Words to that effect must be found by necessary implication in the section before the appellants can make good their contention at your Lordships' bar. I need hardly say that no such words are to be found there. When you come to the enacting part, when the order of the

H. L. (E.) 1897 WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY. Lord Herschell.

Local Government Board has been obtained, all the Legislature has said they may do is that they may borrow the requisite amount to redeem the balance of the loan, but there is nothing in the shape of a provision that they shall have a right to redeem the loan independently of the terms upon which the loan was contracted.

My Lords, it has been suggested that if this construction be not put upon the section—if some such words as these be not imported, the section is meaningless or purposeless, because there can hardly ever be a case to which it would apply. That seems to me to be a most complete misapprehension. Supposing it gives no power to redeem against the will of the lender—after this statute was passed any board of guardians borrowing could make whatever terms they pleased with the lender as to redemption, and inasmuch as a statute had been passed which gave them the power they required to enable them to redeem at any time with the sanction of the Local Government Board, they might have gone about amongst the lenders from whom the money was to be obtained and said, "We are only prepared to take a loan upon the terms of such and such notice, and having now the powers which the statute gives us we shall be entitled to borrow the money and redeem." To suggest that they could not possibly have found any lender to lend money to them on those terms is to cut away the whole foundation of the argument on the part of the appellants.

If, then, the statute gave them this power, and when they had got this power they could enter into a contract on such terms that it would be exercisable, then there is enough for the statute to operate upon; there is ample reason for the statute being passed without supposing that the statute enabled a board of guardians in every case to compel a contract to be entered into upon such terms that they should always be in a position to pay it off. The two things are quite distinct. The Legislature may well have intended to allow them to pay off their loans when they found lenders to contract on those terms, and to enable them to contract on the terms of so paying them off, without having intended to say to them, "You shall only in future contract a loan on such terms that you shall be entitled

to pay it off." It might be, one can conceive, an excellent thing to give the power of so contracting to the guardians, but it would be a very questionable thing to impose such a constraint as it is suggested was imposed. Therefore, when one looks at the object and purpose of the Act, there seems to me to be every reason for construing it in the sense of its being a power merely, and not operating with the compulsory effect that has been suggested.

Consequently, my Lords, so far from seeing any reason for departing from the language of the Act if it were capable of one or other of the two constructions, my inclination certainly would be to put upon it the construction that would make it permissive, rather than the construction that would make it compulsory. But the truth is there is nothing to be found in the enacting part of the provision, as I have said, which can reasonably have the effect contended for: it is said to be found in the proviso. The argument is this: The proviso shews that the Legislature contemplated that the loan could be paid off but for the proviso against the will of the person who had lent the money, and has in the proviso protected only those who had lent the money previous to the passing of the Act. My Lords, I am not satisfied that the proviso has that meaning and operation only. I am not going to repeat the reasons which have been given for thinking that it may be a perfectly sensible proviso to guard against the particular evil suggested; but I do not care to rest upon that, and I desire not to rest upon it. If I thought the proviso as senseless as has been suggested, supposing the construction I put upon the Act is adopted, I should come to the same conclusion, and I think any other conclusion would be in the highest degree dangerous. I decline to read into any enactment words which are not to be found there, and which would alter its operative effect because of provisions to be found in any proviso. Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and shew when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it; but to find in

H. L. (E.) 1897 WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY. Lord Herschell.

it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless, would, as I have said, be in the highest degree dangerous. And for this reason: one knows perfectly well that it not unfrequently happens that persons are unreasonably apprehensive as to the effect of an enactment when there is really no question of its application to their case; they nevertheless think that some Court may possibly hold that it will apply to their case, and they suggest if it is not intended to be applicable no harm would be done by inserting a proviso to protect them; and, accordingly, a proviso is inserted to guard against the particular case of which a particular person was apprehensive, although the enactment was never intended to apply to his case, or to any other similar cases at all. If the construction contended for were adopted the result would be this: Having put in a proviso which was thought to be needless in order to satisfy certain persons, or a particular class of persons, and allay their fears, you would have the enactment so construed against the intention of the Legislature as to impose a liability upon a number of people who were not so apprehensive, or perhaps were not present, and therefore either did not think it necessary or were not in a position to protect their own interests by a proviso. My Lords, I am satisfied that many instances might be given where provisoes could be found in legislation that are meaningless because they have been put in to allay fears when those fears were absolutely unfounded, and when no proviso at all was necessary to protect the persons at whose instance they were inserted.

For these reasons I think it is impossible, even taking any view of the meaning of this proviso, to find in the enactment the right for which the appellants contend; and therefore I think the judgment appealed from should be affirmed.

LORD SHAND. My Lords, I am also of opinion that the judgment appealed from should be affirmed, and I agree in all that has been said as to what may be called the enacting part of this clause. Without going again into the reasons for this opinion, I think it is clear that the first part—the enacting part—

of the clause merely provides for an authority or sanction being given, as a protection to the ratepayers, against those who are managing the poor funds for them. I can see nothing from beginning to end of that clause which I should hold, if there were no proviso there, to confer a power to interfere with the securities given, so as to compel the person who had lent the money to accept the repayment of it at any time, notwithstanding the fact that the document upon which he lent it provided for its being paid by instalments over a series of years.

My Lords, when one comes to the proviso, I agree with your Lordships that it cannot be held to control the substantive enactment. I agree with what has been said by my noble and learned friend opposite (Lord Herschell) on that subject. I am, therefore, of opinion that the judgment appealed from ought to be affirmed.

LORD DAVEY. My Lords, I entirely agree, and I am so perfectly satisfied with the reasons which have been given by the majority of the learned judges in the Court of Appeal for their judgment, that I do not desire to add anything to what has been said by Lindley and Rigby L.JJ. and your Lordships.

My Lords, it seems to me that the whole argument of the appellants really comes to the old and apparently ineradicable fallacy of importing into an enactment, which is expressed in clear and apparently unambiguous language, something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own. I entirely agree with what has fallen from my noble and learned friend opposite (Lord Herschell) upon this subject. Therefore I think that the appeal should be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 23, 1897.

Solicitors for appellants: *Sharpe, Parker & Co. for Cleaver, Holden & Co., Liverpool.*

Solicitors for respondents: *Travers Smith, Braithwaite & Robinson.*

[HOUSE OF LORDS.]

H. L. (E.) 1897 July 5.

VAN GRUTTEN . . . . . APPELLANT;

AND

FOXWELL AND OTHERS . . . . . RESPONDENTS.

(BY ORIGINAL APPEAL).

FOXWELL AND OTHERS . . . . . APPELLANTS;

AND

VAN GRUTTEN . . . . . RESPONDENT.

(BY CROSS APPEAL).

Will, Construction of—Estate Tail—Issue—Heirs—Gift Over—Descent—Purchase—Rule in Shelley's Case.

A testator devised lands to trustees in trust to receive the rents and profits for the use and benefit of such of his child or children as should be living at his death, and to apply such rents and profits or so much thereof as the trustees should deem right and proper in the maintenance and education of such child or children until majority or marriage, and from and after majority or marriage in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one or be married, to take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for her, his, or their lives; and if he left only one child then to permit and suffer such one child to take the rents and profits for her or his sole use and benefit for her life; and he declared that from and after the death of such child or children, the trustees should stand seised of the lands in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one to be equally divided between them, such lands to be legally conveyed to such heirs of any child or children in equal shares as they should respectively attain the age of twenty-one or be married, and to their respective heirs and assigns for ever, with power in the meantime to apply the rents and profits in the maintenance and education of such heirs of his child or children. And if he should die leaving no child or children, or issue of any child or children, or if such child or children as he should leave and the issue of such child or children should die before he or they should attain the age of twenty-one or be married—then a gift over.

The testator died leaving only one child surviving him: that child married and left a son who reached twenty-one:—

Held, that the legal estate vested in the trustees throughout; that the estates both of the child or children and of the heirs of their body were

Considered. In re WILLIAMS [1952] 1 Ch. 828

equitable; that the rule in *Shelley's Case*, (1581) 1 Rep. 93 b, applied, and that the testator's child took an estate tail.

A will devised lands to W. in fee simple. By a codicil the testator devised the lands upon the same trusts as were set forth in the will, but nevertheless upon the special trust, and his will was, that it should not be lawful for W. at any time during his life to suffer any recovery or enter into any deed, matter, or thing whereby to cut off, dock, or destroy the entail of his said freehold lands:—

Held, that the codicil did not cut down the fee simple estate given by the will to an estate tail.

THE original appeal arose upon the will of William Harris as follows:—

William Harris, being the owner in fee of lands in Cornwall, by his will made October 31, 1804, devised his lands to trustees and to the survivors and survivor of them and the heirs of such survivor in trust to receive the rents and profits to and for the use and benefit of such of his child or children as should be living at the time of his death, and to pay and apply such rents and profits, or so much thereof as the trustees should deem right and proper, in and about the maintenance and education of such child or children until they should severally and respectively attain the age of twenty-one years or be married; and from and after such child or children should have attained the age of twenty-one years or be married, then in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one, or be married, to receive and take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for the term of her, his, and their life or lives; and if he left only one child then to permit and suffer such one child to receive the rents and profits for her or his sole use and benefit for the term of her or his life. The testator declared that his will was that from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided between them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. — FOXWELL v. VAN GRUTTEN.

to their sev eral and respective heirs and assigns for ever. Power was gi ven to the trustees in the meantime to apply the rents and profi ts in and about the maintenance and education of such heirs of his child or children. The gift over was introduced in these te TE rms: "And if it shall happen that I shall depart this life leav ing no child or children, or issue of any child or children, or if such rs child or children as I shall leave, and the issue of such child or ch ildren, shall die before he, she, or they shall attain the age of twen AL ty-one years or be married, then" a gift over to collateral relatives. The will appointed the testator's daughter Mary Harris residuary legatee and devisee.

The testator died in 1815 leaving an only child, a daughter, who married, and became Mary Hartley. She, again, had only one child, William Henry Harris Hartley.

Mary Hartley by deed in 1835 purported to ba r her estate tail, and died in 1868. Her only child, William Her ry Harris Hartley, died intestate in 1894.

The respondents, Foxwell and others, brought an re action against the appellant Van Grutten, claiming the lands as sho their of William Harris.

At the trial before Vaughan Williams J. the jury found ce fr in favour of the plaintiffs. On further consideration the learned o judge held that Mary Hartley took an estate tail, and that her be deed in 1835 was invalid because—this being a question of fact for which by agreement was left to the judge—she was, in his if Lordship's view of the evidence, insane at the time; and that the plaintiffs were entitled to judgment. This decision was affirmed by the Court of Appeal (Lord Halsbury L.C., Lopes and Rigby L.JJ.). Other questions arose which need not be noticed as they do not affect the main question, namely, whether the rule in *Shelley's Case* (1) applied.

The cross-appeal arose upon the will of Henry Harris as follows:—

Henry Harris, by his will dated July 11, 1828, devised his freehold hereditaments to the use of certain trustees in trust for his niece Mary Hartley for life, and after her death upon trusts which, it was admitted, gave the fee simple of those

(1) 1 Rep. 93 b.

hereditaments to her son William Henry Harris Hartley. The only question raised by this cross-appeal was whether the effect of a codicil executed on January 1, 1829, was to cut down this estate in fee simple to an estate tail.

By the codicil the testator devised the same hereditaments to the same trustees "upon the same trusts as are in my said will set forth, but nevertheless upon this further special trust, and my will is that it shall not be lawful for the said William Henry Harris Hartley at any time or times during his lifetime to suffer any recovery, or enter into any deed, matter, or thing whatsoever, whereby to cut off, dock, or destroy the entail of my said freehold messuages, lands," &c.

The plaintiffs in the above action claimed the hereditaments on the ground that the codicil cut down the fee simple to an estate tail. If the codicil did not cut down the fee simple to an estate tail, it was admitted that the defendant in the above action, Van Grutten, was entitled to the hereditaments as the heir of William Henry Harris Hartley. Vaughan Williams J. gave judgment for the plaintiffs; but this decision was reversed by the Court of Appeal, who held that the defendant was entitled.

The original appeal and the cross-appeal were argued on March 8, 9, 11, 12, and 23, by

Haldane Q.C. and *T. H. Carson* (*Boome* with them) for the appellant on the original appeal and the respondents on the cross-appeal; and by

Crackanthorpe Q.C. and *J. A. Foote* for the respondents on the original appeal and the appellant on the cross-appeal.

The House took time for consideration and delivered judgment on July 5, in the appeal first as follows:—

July 5. LORD HERSCHELL. My Lords, the decision of this case turns principally upon the construction of the will of William Harris, dated October 31, 1804. The question is whether his daughter Mary took under his will an estate tail or only an estate for life. [His Lordship stated the parts of the will above set out.] The question is whether, upon the true

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Herschell.

construction of the provisions I have referred to, the rule in *Shelley's Case* (1) applies, so that the testator's daughter took an estate tail, or whether, as contended by the appellant, the son of that daughter took the fee by purchase.

It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold and the estate limited to the heirs of that person are not of the same quality, that is to say, if the one be legal and the other equitable, the rule in *Shelley's Case* (1) has no application. If they are either both legal or both equitable, the rule applies. Although the legal estate is in the present case vested, in the first instance, in the trustees, there is no doubt that the language of the will by which the trustees are to permit and suffer his child (if only one) to receive the rents and profits for her sole use and benefit, is sufficient, if those words stood alone, to pass the legal estate to the testator's child. It is equally clear, however, that the trusts of the will require that prior to his child attaining twenty-one the legal estate should be in the trustees, and that it should again be in the trustees after his child's death. Where there are such dispositions as are to be found in the present case, I think the true view is that the legal estate remains throughout in the trustees, and that the estate of the beneficiaries is equitable only. This view is supported by the authority of *Harton* v. *Harton* (2) and other cases, and I think it is both a convenient and a sound one.

I proceed now to consider whether the terms of the devise vested in Mary Harris an estate tail. If the devise had ended with the words "unto and to the use of the heirs of the body and bodies of such child, if more than one, to be equally divided between them," it would have been, I think, beyond controversy that Mary Harris took an estate tail. The rule in *Shelley's Case* (1) cannot, I think, be regarded as a mere rule of construction designed to carry out the intentions of the testator, and which will therefore yield to any indication of a contrary intention to be found in the will. It is a rule of law that where an estate is devised to the "heirs" or "heirs of the body" of a person to whom a prior estate of freehold has been

(1) 1 Rep. 93 b. (2) (1798) 7 T. R. 652.

given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor. A testator can no more make such a devise and direct that it shall not have this operation than he can, in terms, create an estate in fee simple or an estate tail, and then direct that these estates shall not have the incidents which the law annexes to them. If words be superadded purporting to have that effect they must be treated as absolutely ineffectual. So, too, must words inconsistent with the possession of an estate tail or in fee simple by one to whom a life estate has been devised, with a subsequent limitation to his heirs, special or general.

At the same time, if the words which are added, or, indeed, any provisions to be found in other parts of the will, shew that the expression "heirs" or "heirs of the body" was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. The rule in *Shelley's Case* (1) does not then apply, because the limitation after the estate for life is not upon the true construction of the will to the heirs or heirs of the body of the tenant for life in the legal sense of those words, any more than it would have applied if the gift had been in terms to a designated person or a designated class.

I do not propose to travel through the authorities. They certainly cannot all be reconciled; but the decisions in this House by which your Lordships are governed, to my mind, amply support the view I have expressed. Since writing the above I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Macnaghten. I entirely agree with the observations he makes as to the origin and scope of the rule. A study of the authorities had led me to the same conclusion, and I find it quite unnecessary to repeat in language probably less felicitous the reasons which he has so pithily and lucidly expressed. I think that the introduction of the notion of a "general intent" and a "particular intent" on the part of the testator, the latter intent yielding to the former, tended to put matters on the wrong track, and to

(1) 1 Rep. 93 b.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Herschell.

suggest that the estate which the devisee took depended after all on the intention of the testator, and not on the effect which the law gave to a devise in particular terms.

I have then next to inquire whether there is anything to be found in the present will which interprets the expression "heirs of the body and bodies of such child or children," and shews that those words were not employed in their legal sense. Mr. Haldane, in his very able argument, relied mainly for this purpose on the provisions which immediately follow. He did not indeed contend that the words "to be equally divided between them" would of themselves suffice to have this effect: the authorities were too strongly against him for such a proposition. But he maintained that, taken in conjunction with the subsequent direction to the trustees to convey to "such heirs" in fee and with other provisions of the will, there was enough to shew that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession. I am unable to accede to this argument. I can find nothing in the will which inevitably leads to the conclusion that the testator used the word "heirs" in a sense other than its ordinary legal one. Indeed, so far from demonstrating that the testator cannot have employed it in its legal signification, the provisions relied on appear to me to be quite consistent with the creation of an estate tail or estates tail in his child or children. The difficulty said to be occasioned by the use of the words "to be equally divided between them" is a difficulty only if you assume that they are intended to apply in case the testator has only one child, and that child has more than one son—a gratuitous assumption, as it seems to me, for the words are properly applicable in the case of more than one child of the testator having an heir of the body, and this sufficiently explains their presence in the will without supposing that by "heirs of the body" the testator meant something else.

Again, what is there inconsistent with the creation of estates tail in his children that the testator should direct his trustees

to convey the reversion in fee to the heirs of the tenants in tail at a particular time? It is, no doubt, a peculiar provision, but it is not nonsensical or incapable of legal operation, though it might, of course, be defeated by his children barring their estates tail.

The testator's daughter Mary did, by an instrument bearing date February 28, 1835, purport to bar her estate tail. Vaughan Williams J. held that she had not effectually done so, inasmuch as he thought it was proved that she was not at that date of sound mind. The law required that before executing the deed she should be examined before commissioners, and it could only be executed if they certified that she was of full age and competent understanding, and if an affidavit was lodged containing a statement to that effect. All this was done; and against this testimony in favour of her sanity the only evidence was the finding of a jury on an inquisition of lunacy taken in December, 1843, that Mary Hartley was then of unsound mind, and had been in the same state of unsoundness of mind from October 31, 1834. I agree with the Court of Appeal in thinking that this finding is not sufficient to outweigh the evidence afforded by the circumstances to which I have called attention. It would, in my opinion, be very dangerous to allow a deed executed by a married woman, who was certified at the time to be of competent understanding, to be treated as null and void merely because a jury more than nine years afterwards found that her insanity dated from a period prior to its execution.

I agree, then, with the Court of Appeal in thinking that an estate tail vested in Mary Hartley, that it was converted into an estate in fee simple by the disentailing assurance if that deed was valid, and that in that case descent must be traced from her as the last purchaser.

The respondents claimed as the heirs of William Harris, treating him as the last purchaser. Although the Court of Appeal came to the conclusion that Mary Hartley, and not William Harris, was the last purchaser, they affirmed the judgment for the respondents on the ground that they were the heirs of Mary as well as of William. It appears that in the

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Herschell.

course of the argument before the Court of Appeal the point was made that if Mary Hartley had effectually converted her estate tail into an estate in fee, and if she had by will validly disposed of her estate, the title of the respondents would be ousted, and it was alleged that such a will existed. The appellant's counsel thought that this point was reserved to them, and I gather that it was so intended by the Court, and that owing to some oversight, due probably to the Court being differently constituted when the judgment was delivered, the judgment was simply affirmed, which deprived the appellant of any opportunity of raising it. I think he is entitled to that opportunity. The respondents claimed as heirs of William Harris. If they had been right in this it would not have been necessary to shew that Mary Hartley had made a testamentary disposition. But if they are permitted, and I think quite rightly, to claim by descent from Mary, this is a different case, and I think the appellant must be allowed, on the other hand, to meet it in any way he can, which he has hitherto not had an opportunity of doing.

I think, therefore, that the respondents should be allowed to amend their pleadings by claiming in the alternative from Mary as the last purchaser, and that the appellant should be allowed to make any amendments to meet this case that he may think fit, and that there should be a new trial to determine the issues thus raised. I think it should be made a condition that the appellant should admit the pedigree which the jury found proved, but that it should be open to either party to produce additional evidence on the question whether Mary Hartley was of unsound mind when she executed the disentailing deed.

My Lords, with regard to the mode of trial, if there should be local evidence to be adduced by either party, it would probably be the most convenient and economical course that the trial should be had locally. If, on the other hand, there is no oral evidence which would require witnesses from the country to be called, probably the most economical course would be that the case should be tried before a judge in London. Of course, it is impossible for their Lordships at the present time

to give any direction upon that point, but they have no doubt the parties will agree, as there is to be a new trial, upon the most economical course for disposing of the issues which will be then raised.

LORD WATSON. My Lords, in this case I have come to the same conclusion as your Lordships, and I concur in the judgment which has been moved by my noble and learned friend on the Woolsack.

The rule in *Shelley's Case* (1) has been obscured rather than elucidated by an accumulated mass of decisions, but it must be taken as restored and established by the decision given by this House in *Jesson* v. *Wright* (2), and as subsequently explained by the noble and learned Lords who gave judgment in *Roddy* v. *Fitzgerald.* (3) I have only to add that, having considered it to the best of my ability, I am prepared to agree with the elaborate opinion which is about to be delivered by my noble and learned friend near me (Lord Macnaghten).

LORD MACNAGHTEN. My Lords, the point in this case turns upon the effect of the first set of limitations in the will, dated October 31, 1804, of William Harris, who died in 1815. And that depends upon the question whether those limitations are so framed as to attract the rule commonly known as the rule in *Shelley's Case.* (1)

The subject, which was discussed with great learning and ability at the bar, so rarely comes up for discussion nowadays that I make no apology for reminding your Lordships of the precise terms in which the rule was stated in the case from which it takes its name. The statement is this (4): "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

Every part of that statement is, I think, deserving of

(1) 1 Rep. 93 b.
(2) (1820) 2 Bli. 1.
(3) (1858) 6 H. L. C. 875.
(4) 1 Rep. 104 a.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

attention, from the opening words, which declare the rule to be a "rule in law," to the last clause, which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word "heirs," though, perhaps, it was not so always (1), and though it seems to have been thought at one time, and, indeed, it was argued as late as 1844—*Harrison* v. *Harrison* (2)—that, in the absence of technical words, the governing principle was not the rule in *Shelley's Case* (3), but the doctrine of cy-près.

The rule has a curious history. No one can tell who its author was. It may be traced in the Year Books as far back as the time of Edward II., but no one can fix the date when it was first recognised. No one knows for certain how it came to be laid down. Even the purpose of its being has been the subject of controversy. The better view seems to be that it is a rule of tenure founded on feudal principles, and that its purpose was to prevent the lord being defrauded of the chief fruits of seigniory. It has been said that the rule was intended to protect the inheritance from abeyance, which either means the same thing or else means very little. Others, rather I think in anticipation of the course of events and the development of modern ideas, have discovered that it was designed to facilitate the alienation of property and the satisfaction of the ancestor's debts, while one very learned writer is of opinion that its main object was to exclude the possibility of creating "an amphibious species of inheritance," calculated to introduce confusion and disorder into the system of our law. (4) Nor are learned writers on the subject agreed as to the mode in which the rule operates. On the one hand, it is assumed that the limitation to the heirs by virtue of some force of attraction unites and coalesces with the limitation of the freehold to the ancestor, and thus operates to vest in him a fee simple or a fee

(1) 1 Rep. 106 b, n. I. 5.

(2) (1844) 7 Man. & G. 938.

(3) 1 Rep. 93 b.

(4) Yet another explanation is proposed by the learned editors of Goodeve's Modern Law of Real Property (Sir Howard Elphinstone, Mr. James W. Clark, and Mr. Arthur Dickson), 4th ed. 1897, p. 239.—F. P.

tail, as the case may be, divided or split by intervening limitations, where there are any. On the other hand, it has been maintained with much plausibility that there is no such union or consolidation, but that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him another and a larger estate, in which the particular estate of freehold becomes merged when there are no intervening limitations. That was Mr. Hayes' view, and I rather think it was Mr. Preston's view, too. It has some support in expressions used by Yates J. and other judges, and it has at least the merit of getting rid of the stumbling block which the opponents of the rule find at the very threshold. If the rule operates by merger it matters not how anxiously or how strictly the particular estate is tied down and confined to a mere life estate.

Whatever may have been the origin of the rule, and whatever may be its mode of operation, it cannot, I think, be denied that the rule was accepted without question in the earlier period of its existence. So much was it part and parcel of the law of England, that for a long time it had no distinctive name of its own. There could have been little hostile criticism then. And, indeed, we know, from what Lord Eldon himself has said, that that great judge, whose habitual caution justifies or illustrates Lord Coke's aphorism, Co. Litt. 338 a, that "the most learned doubteth most," was convinced that there was at least one case about which he would have had no sort of hesitation, if only his lot had been cast in the clearer atmosphere of olden days. If he had lived, he says, two hundred years earlier, he would have had no doubt that such limitations as were to be found in *Jesson* v. *Wright* (1) would have given an estate tail. But before the time of *Jesson* v. *Wright* (1) there had come a change. Things were not going well with the rule. Its feudal origin was a disgrace. Its antiquity was a reproach. Some judges thought that on those grounds it ought to be "discountenanced." (2) Then it was constantly made a matter of complaint that the rule disappointed the intention, as if that were not its very end and purpose—as if it had not been at the outset "levelled against the views of

(1) 2 Bli. 1, 13. (2) 1 Coll. Jur. 297.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

the parties": Preston, Succinct View, p. 13. It was always being disparaged, and, what was perhaps worse, it was always being explained. It led to profound discussions and to some very pretty quarrels. One object of Mr. Fearne's famous work was to refute Lord Mansfield's heresies in *Perrin* v. *Blake* (1), then under appeal to this House. Unfortunately in a later edition the author suggested or proved that Lord Mansfield had not always been true to his own mistaken creed. That, of course, was an imputation not to be borne: it was resented and repelled from the Bench: *Hodgson* v. *Ambrose* (2); and so Lord Mansfield and Mr. Fearne differed and quarrelled. Lord Thurlow and Mr. Hargrave agreed in everything, and they quarrelled too. They had been friends. "The rule in *Shelley's Case*" (3), so Mr. Hargrave tells us (3 Juriscon. Ex. 406), "had often been discoursed upon" between them. Their friendship stood that strain. But when Mr. Hargrave laid the fruits of his labours before Lord Thurlow, and proposed to introduce a complimentary reference to the Chancellor, who had shewn in *Jones* v. *Morgan* (4) that he once enjoyed a vision of the true doctrine in its primitive simplicity, Lord Thurlow felt it was time to draw back. He acknowledged the imperative character of the rule. On that point he was as sound as Mr. Hargrave himself, whose treatise would have borne the proud motto, "Aut Cæsar aut nullus," but for fear that some unkind critic might misread the allusion and mock the author. So far those great lawyers were at one. But Lord Thurlow thought that Mr. Hargrave was making too much fuss about his work of discovery or restoration, and he was not, I fancy, altogether certain what part was being reserved for the Lord High Chancellor, whether he was to come in as the master or the disciple. At any rate, his reply was cold and distant. He sends his best respects to Mr. Hargrave. "For himself," he writes (3 Juriscon. Ex. 360), "he really does not remember the time when he thought the application of the rule in *Shelley's Case* (3) could depend upon anything else but the question whether the word 'heirs' was the designation of some particular person, or in-

(1) 1 Coll. Jur. 321.
(2) (1780) 1 Doug. 343.
(3) 1 Rep. 93 b.
(4) (1783) 1 Bro. C. C. 205.

cluded successively all who might pretend to inheritable blood." That was putting the case in a nutshell.

But it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there. In spite of the simplicity of the view which commended itself to Mr. Hargrave and Lord Thurlow, and which, indeed, was never at any time wholly obscured, there grew up a mass of decisions so numerous and so perplexing that, in Lord Eldon's opinion (1), "the mind is overpowered by their multitude and the subtlety of the distinctions between them." Some have attributed this result to that most unsatisfactory doctrine of "particular intent" and "general intent," which practically destroyed both by rejecting the one and placing the other at the mercy of the first taker, a great favourite with Wilmot C.J. and with Lord Kenyon, but a doctrine that, in my opinion, if I may be permitted to say so, has all the merits and some of the dangers of those nostrums which are advertised as universal remedies. Others have traced the mischief in part, at least, to that impatience of criticism which at one time led the learned judges of the King's Bench when returning their certificates to withhold their reasons. Others, again, think it may have been due to a more praiseworthy motive. Courts of law, it is said, in course of time became ambitious of keeping pace with courts of equity in discerning the intention of the testator and giving effect to it. The eminent judge who always strove to be foremost in that race seems to have acted, not unfrequently, under the apprehension which he expressed in *Perrin* v. *Blake* (2), that "if courts of law will adhere to the mere letter of law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law and temper with equity." Indeed, Lord Mansfield, as Lord Redesdale says (3), "seems to have considered that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts of equity." The result is to be seen in a number of decisions which would be intelligible enough, and perhaps appropriate, if the Court were moulding limitations in order to

(1) 2 Bli. 50. (2) 1 Coll. Jur. 321.
(3) (1803) 1 Sch. & Lef. 66.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

give effect to executory trusts, but which are difficult to follow, and apparently out of place in the construction of legal devises. But then Lord Mansfield thought that the distinction between an executory trust and a trust executed was a distinction not "founded in sense." (1)

At length, by the decision of this House in *Jesson* v. *Wright* (2) in 1820, the law was restored, at least for a time. That decision, as it seems to me, starts with the principle that the rule in *Shelley's Case* (3) is a rule of law—"inflexible," as it was termed by one of the noble Lords who spoke in the subsequent case of *Roddy* v. *Fitzgerald* (4), operating invariably, and, so to speak, automatically whenever the limitations are such as to call for its application. Proceeding on that footing, this House had only to construe the words of the will according to the established rules of construction. The most important of those rules for the purpose in hand was stated by Lord Redesdale in the following words: "The rule is," said his Lordship, "that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." What is to be understood by "otherwise" is shewn, I think, by the last words of the passage, in which the rule was repeated in *Roddy* v. *Fitzgerald*. (5) "It is another and most important rule," said Lord Wensleydale, "in the construction of the words used in a will, that technical terms or words of known legal import should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to shew what that sense is."

The decision in *Jesson* v. *Wright* (2) covers, I think, the whole field of controversy. It makes it almost a work of supererogation to consult the earlier authorities. "No man can reconcile the decisions," as Sir E. Sugden very truly

(1) 1 Coll. Jur. 295.
(2) 2 Bli. 1.
(3) 1 Rep. 93 b.
(4) 6 H. L. C. 879.
(5) 6 H. L. C. 877.

observed. (1) The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright*. (2) And therefore as new cases arise it seems to me to be safer to apply the ultimate test at once. For a time *Jesson* v. *Wright* (2) was loyally followed. In *Doe* v. *Harvey* (3) the Court of King's Bench acknowledged their error, and recalled their former decision. But very soon cases occurred, such as *Right* v. *Creber* (4), in which proper effect does not seem to have been given to the authority of *Jesson* v. *Wright*. (2)

The most disappointing case of all, I think, is the Irish case of *Montgomery* v. *Montgomery* (5), before Sir Edward Sugden in 1845, on which Mr. Haldane so much relied. Everybody must acknowledge Sir Edward Sugden's profound learning. He was himself one of the counsel for the appellant in *Jesson* v. *Wright* (2), but though successful in the appeal, he does not seem to have welcomed the short and simple grounds on which the decision was rested: see Sugden on the Law of Property, 251, n. Perhaps the editor of Gilbert on Uses would have preferred that something should have been left of the old labyrinth through which he, at least, knew his way in the dark. His observations in *Montgomery* v. *Montgomery* (5), as he tells us, were made "with a view to clear up the doubts on this branch of the law." (6) The result was unfortunate. No difficulties were cleared up—no doubtful points explained; and *Montgomery* v. *Montgomery* (5) is never cited except when it is desired to minimise the effect of *Jesson* v. *Wright* (2), and it is always cited then. There is a good deal in the earlier part of the judgment which is difficult to follow. In my opinion it is not an accurate view of the decision of this House in *Jesson* v. *Wright* (2) to say that it "only decided that the words 'heirs of the body' should operate as words of limitation where otherwise the issue could not take estates of inheritance." Except for the purpose of making that point good, I cannot understand why Sir E. Sugden should have suggested that *Doe*

(1) (1845) 3 J. & Lat. 50.
(2) 2 Bli. 1.
(3) (1825) 4 B. & C. 610.
(4) (1826) 5 B. & C. 866.
(5) 3 J. & Lat. 47.
(6) 3 J. & Lat. 60.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

v. *Goff* (1) was not really overruled, and that "a similar case would be open to consideration." One of the two noble and learned Lords who spoke in *Jesson* v. *Wright* (2) condemned *Doe* v. *Goff* (1) in plain and direct terms. The other said it was "difficult to reconcile" with the case before the House. Sir Edward Sugden on this remarks that the Lord Chancellor did not say it was impossible; he said it was difficult. But the language is Lord Eldon's, and, as was observed of another judge in another case, "it was a great deal *for him* to say." Over and over again in this House *Doe* v. *Goff* (1) has been treated as no longer law. In *Fetherston* v. *Fetherston* (3), which by the way is not referred to in *Montgomery* v. *Montgomery* (4), Lord Brougham observed that it was "entirely displaced" (5), and it is spoken of in the same way in *Winter* v. *Perratt* (6) and *Roddy* v. *Fitzgerald.* (7) Again it is difficult to understand how the words "heirs of the body" when construed to mean children can have the effect of giving an estate of inheritance in a case under the old law where a gift to children, under the designation of children, would not carry the fee, and I must say I do not think that the case of *Burchett* v. *Durdant* (8) is any authority for such a singular proposition, which seems to be taken from the notes to Gilbert on Uses, published by Mr. Sugden shortly after he was called to the bar. Lastly, I cannot think that the passages which Sir Edward Sugden collected from the argument of Blackstone J. in *Perrin* v. *Blake* (9), and pieced together in his judgment in *Montgomery* v. *Montgomery* (4), convey an accurate representation of the meaning of that learned judge. Undoubtedly Blackstone J. refers to the rule in *Shelley's Case* (10) as a rule of a flexible nature. But he did not, I think, mean that the rule as we understand it, and as it was understood in *Roddy* v. *Fitzgerald* (7), was otherwise than imperative. You may have a gift of an estate of freehold to the ancestor, and in the same

(1) (1809) 11 East, 668.
(2) 2 Bli. 1.
(3) (1835) 3 Cl. & F. 67.
(4) 3 J. & Lat. 47.
(5) 3 Cl. & F. 76.
(6) (1843) 9 Cl. & F. 686.
(7) 6 H. L. C. 881.
(8) (1690) 2 Vent. 311.
(9) Hargrave's Law Tracts, 489.
(10) 1 Rep. 93 b.

will a gift to the heirs, so that the case is within the letter of the rule, and yet the rule will not apply, because the legal meaning of the word "heirs" has to yield to an explanatory context. It seems to me that all Blackstone J. meant was what Lord Alvanley expressed when he said: "The rule was not so rigid as to preclude the testator himself from explaining the words used": *Poole* v. *Poole*. (1) I think this would have been tolerably clear even from the extracts given in *Montgomery* v. *Montgomery* (2) if an important sentence had not been unfortunately omitted. "I am far from maintaining," observes Blackstone J., in the sentence to which I refer, "that by a devise to a man's heirs or the heirs of his body they shall never take as purchasers in any case. But I have never observed it to be allowed except in one of these four situations." And then follow the four cases which Sir E. Sugden summarises, and refers to, apparently, as demonstrating an intention "to put an express negative on the general rule of law which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body." Now, it is to be observed that the first two cases are not within the rule in *Shelley's Case* (3) at all. The rule has nothing to do with cases where there is no estate of freehold given to the ancestor, or no estate of inheritance given to the heirs. The last two cases fall outside the rule as soon as it is ascertained by the ordinary rules of construction that the words "heirs of the body" are the designation of a particular class of persons and do not comprehend the whole line of succession. I may observe that in the old books it is not at all uncommon to find the rule in *Shelley's Case* (3) spoken of in this loose kind of way; and, indeed, I cannot help thinking that much of the "profound and animated" discussion about the rule in *Shelley's Case* (3), in which the greatest lawyers of the day contended for victory, was little more than a verbal controversy.

In connection with Sir Edward Sugden's view of Blackstone J.'s opinion, it is interesting and perhaps instructive to turn to what Lord Thurlow says of it in his correspondence

(1) (1804) 3 B. & P. 620. (2) 3 J. & Lat. 47
(3) 1 Rep. 93 b.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

with Mr. Hargrave. Blackstone J.'s judgment was not published in his lifetime, nor was it prepared for publication by him, nor was it among the papers which he directed his executors to publish. Lord Thurlow thought that it had not received his final corrections, and therefore ought not to have been published at all. He points out that there is some confusion in Blackstone J.'s classification of rules of law, and that he put the rule in *Shelley's Case* (1) in the wrong category. The mistake, says Lord Thurlow, has occasioned some few incorrect expressions in the sequel of his argument. "All this, however," he adds (3 Juriscon. Ex. 363), "by no means shews that he understood the rule in *Shelley's Case* (1) to be a mere rule of interpretation; on the contrary, it is treated throughout as a rule of legal policy, and the question is fairly put, whether there be any expression or declaration plain or necessary implication to control the sense in legal idiom of the word 'heirs.'".

Lord Thurlow's views as judicially declared do not differ from the views contained in his correspondence with Mr. Hargrave, though they are not, perhaps, so simply or so clearly expressed.

In the case of *Jones* v. *Morgan* (2), to which I have already referred, Lord Thurlow says: "I take the rule in *Shelley's Case* (1) never to have been shaken at all. I take that rule to be that where the heir takes in the character of heir, he must take in the quality of heir. I take the question always to have been as to the import of the word 'heir' in the *proposed* case." And again, in his final judgment, he says: "All *heirs* taking as *heirs* must take by descent. In cases where I can bring it to the point that the testator by the word 'heirs' as used in the will means first, second, third and other sons, there I change the words of the will. . . . . The cases have been laboriously argued on points which I, therefore, dare not call immaterial. I think the argument immaterial that he meant the first estate to be an estate for life. I take it that in all cases the testator does mean so; I rest it upon what he meant afterwards . . . . All possible *heirs* must take as *heirs* and not as purchasers."

The authority of *Jesson* v. *Wright* (3) was restored, and its

(1) 1 Rep. 93 b. (2) 1 Bro. C. C. 205. (3) 2 Bli. 1.

supremacy finally established in *Roddy* v. *Fitzgerald* (1), and the question now in every case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.

I turn then to the first set of limitations in William Harris's will. To begin with, there is a sufficient estate of freehold given to the ancestor. It is hardly necessary to say anything about the estate or estates for life. The testator had one child at the date of the will, and he provides for the possibility of future issue. For the purpose of this case it is immaterial to consider whether the life estates of the testator's children, if there had been more than one, would have been followed immediately by estates of inheritance in the heirs of their bodies, or whether in point of enjoyment the estates of the heirs special would have had to wait until the death of the last survivor of the tenants for life—a possible, but, in my opinion, rather an improbable construction on the face of this will.

Then we come to the gift to the "heirs of the body and bodies of the child or children" of the testator. It may be conceded that "the heirs of the body," whatever that designation means, were intended to take as the stock of a new descent, and to take by purchase. But that is immaterial. The first question seems to be, Is there anything to prevent the words "heirs of the body" being understood in their proper and legal sense? Mr. Haldane said there was. He said he could put his finger on four different places where the testator had shewn a desire to depart from the regular course of descent in an estate tail. His point was, that although one or two, or even perhaps three, inconsistent or repugnant directions may be insufficient to control the proper meaning of the technical words, yet no case had ever contained so many eccentricities as this; the testator had tripped so often that there must be a method in his tripping, and the Court was bound to find out the secret. If Mr. Haldane's premises were correct, would the

(1) 6 H. L. C. 823.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

circumstance on which he relied make any difference in the construction of the will? Would it not be just one of those "petty distinctions" reprobated in this House in *Jesson* v. *Wright* (1) and in *Roddy* v. *Fitzgerald*? (2) But I differ from Mr. Haldane altogether. I cannot see any mistake in this part of the will, or any flaw in these limitations. The testator has used four different expressions, "children," "heirs of the body," "heirs," and "issue," and he has not made a slip in the use of any one of them. From first to last I can find no direction inconsistent with the regular course of an estate tail. It was said that though the draftsman was a lawyer he was a very poor one, and that, as he had blundered in the devise to the trustees of his will, you could not place much reliance on his handiwork. There, again, I differ. It is quite true that he has made a mistake in the devise to the trustees giving a contingent estate in fee to the survivor. But that, I fancy, was not a very uncommon mistake at the time, and it is one of little or no practical importance: Co. Litt. 191 a, note 1. As far as these limitations go, I think the draftsman has shewn himself a very competent lawyer. When you can give effect to every word, attributing to each expression its proper legal signification, and the result, through perhaps unexpected or unusual, is not irrational or absurd, I do not think you ought to approach the construction of the will with the idea that the testator probably did not mean what he has said. "The good sense of all these cases," said Lord Thurlow (3), "is to believe that where persons have expressed themselves right they knew what they meant." If I may say so, I think that is a wholesome rule, and a rule we ought to adopt in construing the will now before us. The devise is to the heirs special, if more than one, as tenants in common. That, I think, is the very thing the testator meant. If more than one of his children left heirs special, the heirs in each line were to take in equal shares as tenants in common. To suppose that the words in question were meant to apply in the case of there being only one child is, I think, to violate the "good sense" of the case. It is

(1) 2 Bli. 1. (2) 6 H. L. C. 875.
(3) 1 Bro. C. C. 221.

like building a wall for the pleasure of running your head against it.

Next comes a direction contained in a parenthesis. The testator directs his trustees to convey the fee simple in equal shares to the tenants in tail in possession in each line on marriage or at majority. That is a perfectly good direction. Being subsequent to the estate tail, and taking effect during its continuance, it is not too remote. The estate tail would not merge in the fee. It would be protected by the statute de donis. The heirs of the body would still claim per formam doni, though the ancestor by levying a fine might bar his issue, and acquire a base fee which would merge. (1) But in any event the ulterior limitations would be superseded. That is a result which, as it seems to me, a prudent testator in the position of William Harris might well have had in contemplation. Why should the testator not have intended what he says? Why should you suppose he did not know what he meant? To construe the words "heirs and assigns" as meaning heirs of the body, or to reject them as inconsistent or repugnant, seems to me to be contrary to every sound rule of construction. A direction to trustees invested with the legal estate in a certain property bidding them convey and assure that property on the occurrence of a certain event to a certain designated person, "his heirs and assigns," is a direction which requires some ingenuity to understand in any sense but one. Nor can I see that any difficulty is caused by the circumstance that the person to take has already an estate tail. The gift is not, nor was it, I think, intended to be, in defeasance of the estate tail. What the testator says in effect is this: "If one or more of my descendants being tenant in tail, or tenants in tail in possession, should marry or attain twenty-one, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail." Surely there is nothing unreasonable in that. It may be said it is an unusual direction. So it is; but that does not make it bad. And it is perfectly consistent with the words introducing the gift over at the end of this set of limitations. It may be

(1) 2 Rep. 61 a; 8 Rep. 74 b.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Macnaghten.

said that the direction is not wanted, for a tenant in tail can acquire the fee. So he can. He could do so then; but there was some trouble in doing it, and a recovery could only be suffered in term time. In *Seale* v. *Barter* (1), where there was a power to make a settlement so as to pass the fee, the same argument was used and failed. It was pointed out, among other things, that the power would enable a disposition to be made of the estate without going through the forms of a recovery. Here there is the additional circumstance that the fee is to be conveyed either on marriage or at majority. And I may observe in passing, that in the event of there being a tenant by the courtesy, his concurrence would be necessary if the tenant in tail wished to acquire the fee.

In the meantime, and until marriage or majority, there is a provision for maintenance. I do not think that any objection can be made to that provision. And then come the words introducing the ulterior limitations. The estate is to go over if the testator leaves no issue, or if such child or children as he should leave, and the issue of such child or children, should die before attaining twenty-one or marriage. Those words seem to me to fit in with the direction to convey the fee to the tenants in tail in possession, on marrying, or attaining twenty-one. On either of these events occurring, the ulterior limitations are displaced, so far as regards the property to which the direction applies. Of course, you must imply cross-remainders, and then the scheme of the will is complete, and the property must either come to one or more of the testator's descendants in absolute ownership, subject to the estate tail, or go over within a very limited period.

If the words "heirs of the body" are to have their proper meaning, the rule in *Shelley's Case* (2) must apply, even though the testator had said in so many words that the heirs special were to take by purchase (Harg. Tracts, 562, and see Wilm. 403; 4 D. M. & G. 588). The result is that Mary Harris, the testator's only child, took an estate tail if the estate limited to her and the estate limited to her heirs special are both of the same quality. I think they are. The estate limited to the

(1) (1801) 2 B. & P. 485. (2) 1 Rep. 93 b.

heirs special is an equitable estate. On the authority of *Harton* v. *Harton* (1), I think the estate limited to Mary Harris is equitable too. *Harton* v. *Harton* (1) is a very old case. It was decided in 1798. Possibly it might just as well have been decided the other way. But *Harton* v. *Harton* (1) has never been overruled, and as it has been, I believe, followed in practice, I see no reason for disturbing it now.

Mary Harris, who became Mrs. Hartley, disentailed. If the disentailing assurance was valid it barred the limitation or direction under which her son, on her death, would have taken the fee by purchase. There was a question as to her sanity at the time; but fortunately for the respondents, as it seems to me, they have so far not succeeded in establishing her incapacity.

On this view there would be an end of the case, and the appeal would fail altogether except for one circumstance. It would appear that at the beginning of the argument in the Court of Appeal the appellant proposed to shew that if Mrs. Hartley acquired the fee she made a disposition of the property which, at any rate, would defeat the title of the respondents. It was not disputed that the appellant was in time to raise the point; but the Court of Appeal very properly thought that the legal argument on the construction of the will ought to be disposed of first. It happened that when the judgment was given the constitution of the Court was not quite the same as it was at the hearing, and, through some misapprehension on the part of the Court, or perhaps on the part of counsel, the appellant was not afforded an opportunity of establishing the point which he desired to raise. I think he ought to have this opportunity now, and therefore I agree in the motion that has been proposed.

LORD SHAND. My Lords, I am also of opinion that, on the questions which have been the subject of argument on the appeal, the judgment of the Court of Appeal should be affirmed. I shall not attempt to repeat what has been already so fully and clearly stated by your Lordships who have preceded me,

(1) 7 T. R. 652.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Shand.

as well as by the learned judges in the Court of Appeal, and content myself with saying that, having given my best consideration to the argument and the authorities on questions with which I cannot claim to have been previously acquainted, for the reasons which have been given in this House and in the Court of Appeal I concur in thinking that the legal estate of the property in question remained throughout with the trustees of the testator William Harris, and that the estates conferred on the beneficiaries, i.e., on Mary Hartley and on the heirs called after her, were both equitable. The rule in *Shelley's Case* (1), therefore, admitted of application. I am further of opinion that, having regard to the terms of the devise which took effect in favour of the testator's daughter and the heirs of her body, the rule in *Shelley's Case* (1) did apply. It appears to me that the terms used, "heirs of the body and bodies of such child or children," were employed in their legal sense, and denote the whole descendants of the child or children in the ordinary course of succession, and I think the appellant's counsel failed to shew that there was anything in the later or other terms of the deed to justify a more limited interpretation, such as would make the devise one in favour of personæ designatæ or of a class only, and so take the devise out of the rule in *Shelley's Case*. (1)

On the question of the alleged invalidity of the deed by the testator's daughter barring the estate tail, I agree in thinking that, having regard to what occurred as a preliminary to the execution of that deed, to the certificate of the commissioners as to the full age and competent understanding of the grantor as proved by affidavit, there was not counter evidence in the finding of the jury carrying back the unsoundness of mind of Mary Hartley till October 31, 1834, sufficient to establish that Mary Hartley was not of competent understanding to execute the deed.

I agree in thinking that, looking to the course which the proceedings have taken, an opportunity should still be given to the appellant under the conditions proposed to prove the existence of a valid will by Mary Harris as alleged, and I

(1) 1 Rep. 93 b.

concur in approving of the proposed order, including what is suggested as to costs.

LORD DAVEY. My Lords, the primary question in this case is, What estate did Mary Hartley take under the will of her father, William Harris, in the lands in question? I will first dispose of one point raised on behalf of the appellant, namely, that the estate in terms limited to the child of the testator for his or her life was a legal estate, whereas the estate limited to the heirs of the body was an equitable estate, and therefore the rule in *Shelley's Case* (1) was inapplicable so as to give the testator's child an estate tail. It is admitted that during the minorities of the testator's children the purposes of the will require that the trustees shall take the legal estate. It is also admitted that after the death of the children the trustees must take the legal estate in order to enable them to convey to the "heirs" of the children at twenty-one, and in the meantime to receive the rents, issues, and profits, and provide for the maintenance and education of "such heirs." But it is said that the words of gift to the children or child after attaining majority are such as to give them the legal estate during their lives. The words applicable, in the event which has happened, are: "If I have only one child, then to permit and suffer such one child to have, receive, and take the said rents, &c., for her or his sole use and benefit for and during the term of her or his life." No doubt the words "permit and suffer" are sufficient to pass the legal estate; but it is not an absolute rule, and the words are not inconsistent with the legal estate remaining in the trustees, though they have no duties to perform. It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed as uses executed in the beneficiaries. This rule was first laid down in *Harton* v. *Harton* (2), and was recognised and acted upon in

(1) 1 Rep. 93 b. (2) 7 T. R. 652.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Davey.

Brown v. *Whiteway* (1) and *Toller* v. *Atwood* (2), and, as the editors of Mr. Jarman's book observe, must now be considered as established. I do not feel disposed to advise your Lordships to differ from it. I think, therefore, that the estates, both of the children or child and of their heirs of the body, are equitable.

The more serious question is whether the rule in *Shelley's Case* (3) is applicable to the terms of the devise, assuming that the devises are of the same quality. Vaughan Williams J., who tried the action, and the Court of Appeal, have held that the point is concluded by authority, and that Mary Hartley consequently took an estate tail. My Lords, I feel very strongly the importance of adhering to the rule that technical expressions and words of known legal import shall receive their ordinary legal meaning. The neglect of this rule, in my opinion, tends to increased uncertainty in the construction of instruments, and to multiply the difficulties of those who have to advise upon them, and therefore to foster litigation. Instead of interpreting the words of the instrument, the Court is too frequently invited to embark on a fruitless speculation as to the testator's intention. The testator may, no doubt, tell you that he uses any particular words in a sense of his own, or (as it has been said) makes his own dictionary; but he must do so in such a manner as to make it plain to the mind of the tribunal which has to construe the instrument, not only that the words are used in other than their ordinary legal signification, but also in what sense they are used.

In my opinion the rule in *Shelley's Case* (3) is a rule of law and not a mere rule of construction—i.e., one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succes-

(1) (1846) 8 Ha. 145. (2) (1850) 15 Q. B. 951.
(3) 1 Rep. 93 b.

sion, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and, indeed, usually overrides and defeats the expressed intention of the testator; but the question always remains, whether the language of the gift after the life estate properly construed is such as to embrace the whole line of heirs or heirs of the body or issue, and that question must be determined apart from the rule, according to the ordinary principles of construction, including those which I have already referred to.

The testator may conceivably shew by the context that he has used the words "heirs," or "heirs of the body," or "issue" in some limited or restricted sense of his own which is not the legal meaning of the words—e.g., he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time. If the Court is judicially satisfied that the words are so used, I conceive that the premises for the application of the rule in *Shelley's Case* (1) are wanting, and the rule is foreign to the case. But I repeat, that in every case the words are to be interpreted in their legal sense as words of limitation, unless it be made plain to the mind of the Court that they are not so used, and in what sense they are used by the testator.

Turning to the will before us, I think, with deference to my noble and learned friend opposite, that although the draftsman was acquainted with legal phraseology he was not master of

(1) 1 Rep. 93 b.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Davey.

the language that he has used, or able to use it with accuracy. It is quite possible, therefore, that the legal meaning and effect of the words of the will will not carry out the testator's intention; but what we have to do is to construe the language.

I do not find it necessary to say what would be the proper construction of the devise to the testator's children if there had been more than one. It is certainly open to the contention that the gifts over after the death of such children to their heirs of the body did not take effect until the death of the survivor of them. The construction of gifts in a somewhat similar form to the present has been discussed in many cases before the Courts, the most recent of which is *In re Hutchinson's Trusts*. (1) Kay J. in that case reviewed all the previous decisions, and came to the conclusion that he was bound on the balance of authority to hold that the gift over took effect in favour of the issue of each tenant for life on his own death without waiting for the death of the survivor. In this case it is not necessary to decide the point, because the testator has himself provided for the event which happened of there being only one child. The words are (reading them short): "If I have only one child, then to permit and suffer such one child to receive and take the said rents and profits for her or his sole use and benefit for her or his life." For the purpose of construction, this is precisely the same as if he had said "to my daughter Mary for her life." The next gift must, I think, be read reddendo singula singulis, and so read, it is as follows: "From and immediately after the death of such child (or of Mary) my trustees shall stand seised and be possessed of the hereditaments hereinbefore devised to them, in trust unto and to the use of the heirs of the body of such child (or of Mary), if more than one, to be equally divided between them, such hereditaments to be legally conveyed and assured unto such heirs of my child (or of Mary) as they shall severally and respectively attain the age of twenty-one years or be married, and to their several respective heirs and assigns for ever." I have assumed, as the construction most favourable to the appellants, that the words of division between the heirs apply to the heirs of the

(1) (1882) 21 Ch. D. 811.

body of a single child; but they may be read distributively, as applying only to the heirs of the body of children if more than one, in which case no difficulty arises from them. The ultimate gift over is in these terms: "If I shall die leaving no child or children, or issue of any child or children, or if such child or children as I shall leave and the issue of such child or children shall die before he, she, or they shall attain the age of twenty-one years or be married." Notwithstanding the able argument of the appellant's counsel, it is not made clear to my mind that the words "heirs of the body" are used in any sense different from their ordinary legal meaning of a line of descent, or, if they were intended to be words of purchase, in what other sense the words are used. To hold otherwise would, I think, be frittering away the sound rule of construction which I have already referred to, and introduce fresh uncertainty and confusion into questions which are now settled by authority. It is plain that the direction that the heirs shall take as tenants in common (assuming that it applies to the heirs of a single child) is not sufficient. One need only mention *Jesson* v. *Wright*. (1) Nor will the terms of the direction to the trustees to convey the legal estate, in my opinion, afford any sufficient reason for construing the words "heirs of the body" as words of purchase. The primary object of the direction is to prescribe the time at which the trustees are to denude themselves of the legal estate after the expiry of the period of maintenance, and I think it must be construed in favour of the beneficiaries under the previous gift, and not as a fresh gift, notwithstanding any inaccuracy in the expression. It has already been decided in many cases, the authority of which cannot be questioned, that the addition of the words "heirs and assigns" after a gift to "heirs of the body," will not enable the Court to give other than the legal meaning to the words "heirs of the body," or preclude the application of the rule in *Shelley's Case*. (2) The gift over to the testator's collateral relatives it is true takes effect not by way of remainder, but as an executory limitation. It does not afford an argument in favour of an estate tail in Mary, but it is not

(1) 2 Bli. 1. (2) 1 Rep. 93 b.

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Davey.

inconsistent with it, and does not therefore afford any argument against the primâ facie legal meaning of the words used. It is common ground that this executory devise did not take effect. Mary Hartley by name is made residuary devisee. She was the testator's sole heiress-at-law, and as the law stood at the date of the testator's death she, of course, took, not a remainder by devise, but the reversion in fee after her own estate tail by descent. She was, therefore, in my opinion, equitable tenant in tail with a legal reversion to herself in fee.

Another construction has been suggested, namely, that Mary took an estate tail defeasible after her death in favour of the first heir of her body who attained twenty-one or married in fee. I think this construction too refined. It introduces a new class of heirs, and, in my opinion, gives a wrong effect to the direction to the trustees to convey, which is not limited as an executory limitation or clause of defeasance, but I think is intended only to give legal effect to the previous equitable devise, and to clothe the beneficiaries under it with the legal estate as soon as the active duties of the trustees had expired. Such a construction, however, would not make any difference in the result if a valid disentailing assurance was executed.

The present respondents, plaintiffs in the action, claimed, by their statement of claim, as heirs of William Harris, the testator, treating him as the last purchaser. According to the view of the Court of Appeal, Mary was the last purchaser; but, as it is admitted that the respondents are the heirs of Mary as well as the testator, I do not think that the judgment should be set aside on that ground only. It is, however, suggested, though not proved, that Mary made a will which excluded the respondents altogether, and if that had been proved at the trial the judgment should have been for the appellants, although they may derive no title under the will. The question turns, in the first instance, on the validity of the disentailing assurance of February 28, 1835. Vaughan Williams J. held that it was proved that Mary was a lunatic at the date of this deed. This point was not left to the jury, but (I suppose by agreement) was decided by the learned judge after the trial. The only

evidence against the deed was an inquisition taken in 1843, by which Mary was found to be of unsound mind, and it was also found that she had been in the same state of unsoundness of mind from October 31, 1834. On the other hand, the appellants did not offer any evidence except the disentailing deed itself, and the certificate of the commissioners for taking acknowledgment of deeds by married women. The certificate is in the form required by s. 84 of the Fines and Recoveries Abolition Act, and was, I presume, accompanied by the affidavit required by the rules then in force, which required the deponent to state (amongst other things) that the married woman was, at the time of making the acknowledgment, "of competent understanding." It was certainly primâ facie evidence of Mary's soundness of mind on the date when she executed the deed; and I think, when the deed, being more than thirty years old, was produced from the proper custody and the certificate was put in, the burden of proof was thrown on the respondents to rebut it, and I do not think they do so merely by the production of the inquisition. It is not pretended that the inquisition was an estoppel, and it appears to me not to be in itself evidence of a very cogent character as to the date on which the lunacy commenced. It is not inconsistent even with Mary Hartley having sufficient possession of her faculties during a lucid interval to enable her to execute the deed. But the deed will not defeat the respondents unless it be proved that Mary executed a will or disposition which excluded them under the power thereby reserved to her.

It has not been argued that she had any other testamentary power at that date; and as her husband did not die until 1847, she could not dispose by will except under a power even of that reversion in fee which she took by descent. The appellants now allege that Mary Hartley made a will, but they did not put it in evidence at the trial, as they might have done. The Court of Appeal has held that it is too late for them to do so. In strictness, I do not think that the appellants, although they might have put it in, were bound to do so. The respondents, by their statement of claim, claim solely as the heirs of the testator, treating him as the last purchaser. In order to defeat

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Davey.

that claim it was, strictly speaking, only necessary to prove that the testator was not the last purchaser, and it was not necessary to do more than shew that Mary acquired a title by purchase. On the evidence before them the Court of Appeal have held that Mary was a purchaser; but it is admitted that the same evidence which proves their title as heirs of the testator will also prove them to be heirs of Mary. Strictly speaking, the respondents should amend their pleadings by stating, at any rate, an alternative claim as heirs of Mary, and I think they ought to be allowed to do so. But if so, it for the first time becomes necessary for the appellants to shew that Mary dealt with the estate in such a way as to exclude the respondents' title as her heirs. I think, therefore, the respondents should be at liberty to amend their statement of claim as suggested by my noble and learned friend on the Woolsack, and I concur in the rest of the order proposed by him.

Order appealed from set aside, and a new trial ordered upon the following terms: that the respondents be at liberty to amend their pleadings by claiming alternatively as heirs of Mary Hartley, and that the appellant be at liberty to amend his defence as he may be advised; that the appellant admit the respondents' pedigree and that they are heirs both of William Harris and of Mary Hartley; and that either party be at liberty to put in any further evidence on the question whether Mary Hartley was of competent understanding; that a receiver of the rents and profits of the lands in dispute be appointed as from this date, such receiver to be appointed, in case the parties do not agree, by a master of the Queen's Bench Division; the appellant to be deemed for the purposes of this action to be still in possession. That the costs of the action up to and including the new trial abide the result, but that each party bear and pay

his and their own costs in the Court of Appeal and of the appeal to this House: Cause remitted to the Queen's Bench Division.

Lords' Journals, July 5, 1897.

Solicitors for appellant: *Collyer-Bristow, Russell, Hill & Co.*
Solicitors for respondents: *Robbins, Billing & Co., for James Clarke, Preston.*

Judgment was then given in the cross-appeal.

LORD HERSCHELL (after stating the effect of the will and the words of the codicil). My Lords, do these words revoke the gift of an estate in fee simple, and substitute the gift of an estate tail? They certainly do not in terms purport to do anything of the kind. Do they effect that result by implication? I think not. It is to be observed that it is expressly declared that the lands are to be held "upon the same trusts" as are in the will set forth. And one of these trusts was that W. H. Hartley should enjoy them in fee simple. The codicil purports to add a further special trust that it should not be lawful to cut off or destroy the entail. Under what impression the testator inserted this prohibition it is impossible to say. Perhaps he thought that an estate tail had been conferred. But had this been so, the attempt to restrict its alienation or conversion into a fee simple would have been wholly ineffectual. Perhaps he did not know what an "entail" meant. To imply the revocation of the gift of an estate in fee simple and the substitution of an estate tail merely because the testator having plainly made the former gift has, by a codicil, sought to annex a condition which would be wholly inoperative whether the estate devised be one in fee simple or in tail would, as it seems to me, be wholly unjustifiable. I do not think it necessary to add anything further to the reasons given by the learned judges in the Court of Appeal. I think this appeal should be dismissed with costs.

LORD WATSON. My Lords, I agree.

H. L. (E.)
1897
VAN GRUTTEN v. FOXWELL.
FOXWELL v. VAN GRUTTEN.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The case seems to me much too clear for argument. Under the testator's will William Henry Harris Hartley took the fee given to him after his mother's death in technical language admitting of no doubt. The testator indeed attempts to attach a condition about not letting part of the property which is plainly repugnant and void. Then comes a codicil made less than a year after the date of the will. It contains no misrecital. The testator evidently had the will before him; for he speaks of the will as being annexed to the codicil, and he copies from the will with strict accuracy the full description of the property devised. He does not express any wish to alter the terms of the devise. On the contrary, he gives the property to the trustees of the will "upon the same trusts," to quote the words of the codicil, "as are in my said will set forth." Then he attempts to attach to the estate he had created another absurd condition—a condition void if annexed to an estate tail, and meaningless if annexed to any other estate. But in framing the condition he speaks of "the entail" of his property. What does he mean by the word "entail" there? Nobody, I think, can tell. It is little use trying to guess. It is enough, I think, to repeat what Lord Redesdale said in *Jesson* v. *Wright*. (1) "It cannot at this day be argued," said his Lordship, perhaps rather too confidently, "that because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown." And if it is to be argued—for argument is not to be repressed merely because it is impossible—if it is to be argued that the testator did not mean to use the technical words in which the devise is expressed in their ordinary legal sense, because there is some other inconsistent word, I again venture to repeat what Lord Redesdale said: "It only follows that he was ignorant of the effect of the one or the other." All else I think is the merest guess-work.

I agree that the appeal must be dismissed with costs.

(1) 2 Bli. 1, 56.

LORD SHAND. My Lords, I am of the same opinion.

LORD DAVEY. My Lords, Henry Harris by his will devised to trustees his lands in trust for Mary Hartley for life, and after her death upon trusts for the maintenance of William Henry Harris Hartley, her son, and such other children as should be living at her death, and if Mary Hartley should have only one child (which event happened), then to permit and suffer such child, after he or she should have attained the age of twenty-one years, and the heirs and assigns of such child, to have, receive, and take the rents, issues, and profits of his said lands, to and for his, her, and their sole use and benefit from henceforth and for ever. There is, then, a gift over in the event of Mary Hartley's death without leaving any child, or her children not attaining twenty-one; but there is no gift over in default of issue of William Henry Harris Hartley, or in any similar event. The testator, in a subsequent part of his will, directed that such person as should from time to time be entitled to his lands aforesaid should, in no case or pretence whatever, let or demise the estates of Rosteage and Trovens, otherwise Trevons, but that the same were to be farmed and cultivated by such person in a farmerlike manner, and to commit no wilful waste, either by the cutting down of trees or in any other respect whatsoever.

It is not disputed that by the will an estate in fee simple in remainder was devised to William Henry Harris Hartley, or that the proviso against alienation was repugnant and void.

By his codicil the testator, after reciting that by his will he had devised to trustees his freehold hereditaments upon certain trusts therein set forth, devised the same estates and hereditaments to the same trustees upon the trusts set forth in his will. But, nevertheless, upon this further special trust, that it should not be lawful for the said William Henry Harris Hartley during his life to suffer any recovery or recoveries, or enter into any deed, matter, or thing whatsoever, whereby to cut off, dock, or destroy the entail of his said freehold lands, &c.

It is argued that the effect of this codicil is to cut down William's estate to an estate tail. I think that the words

H. L. (E.) 1897 VAN GRUTTEN v. FOXWELL. FOXWELL v. VAN GRUTTEN. Lord Davey.

of the will must be held to be repeated and written afresh in the codicil. The argument must therefore be that, by reason of the prohibition against William destroying the entail, the previous word "heirs" must be construed as "heirs of the body." No doubt a gift to "A" and his "heirs" has been so construed, where there has been a gift over in case "A" shall die without heirs of his body or without issue, or even on failure of heirs, if the gift over be to a person in the line of heritable descent. But in these cases the gift over cannot have effect given to it except by way of remainder, or unless the previous devise is of an estate tail only, and the word "heirs" is therefore construed in a restricted sense by necessary implication. But no case was cited at the Bar in the least degree resembling the case before the House, and I have not been successful in finding any case where the word "heirs" is restricted to "heirs of the body" except by such necessary implication as I have referred to. We must, therefore, apply the well known and sound principle that clear and unambiguous words of gift are not to be cut down or qualified by an ambiguous proviso. Vaughan Williams J. thought that the testator acted on the assumption that he had created an estate tail. It would, in my opinion, be more accurate to say that the testator assumed he had created something which he called an "entail." But what he meant by it I do not know, and decline to speculate. He may have thought that the estate created by his will, with the restrictions which he attempted to impose on alienation and enjoyment, was an entail, or he may not have had any clear idea as to the meaning of a recovery or an entail, as he certainly had not as to the effect or incidents of a gift to a man and his heirs. I content myself with saying that I cannot find in this blundering proviso any sufficient grounds to induce your Lordships to give any but their ordinary legal meaning to the gift to William Henry Hartley, his heirs and assigns. It is further to be observed that if Mary Hartley had had more children than one the effect of the appellants' construction would be to give different estates to William Henry Harris Hartley and the other children.

It was, however, suggested in the course of the arguments

before your Lordships, that William Henry Harris Hartley could not take as purchaser because on the death of Mary, which happened after the passing of the Inheritance Act, he would have become entitled as heir of the testator to the same estate as was devised to him. It would be a strange result if this were so, for it is only by reason of the rule applicable to wills dated before the Act that his title by descent would be preferred to that by devise, and yet under the law as it then existed he could not be in by inheritance from the testator, as the descent would be traced from Mary, the person last seised; so that the point could never have arisen. The real answer, I think, is that he was not the heir at the death of the testator, and took under the will by purchase a vested remainder in fee after Mary's death, liable to be divested pro tanto in favour of after-born children living at Mary's death. There is no authority for saying that, if once a man acquires an estate by purchase as devisee, that estate is divested in favour of one by descent if he afterwards becomes the testator's heir-at-law, unless *Clarke* v. *Smith* (1) be such authority. The facts are not stated in the same way in the different reports, and it does not appear from any of them that this point was adverted to either in argument or judgment, and I decline to treat it as an authority upon the point binding this House. I also think that the old rule ought not to be applied to a new case which only arises in consequence of the alteration in the law of inheritance made by the statute.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 5, 1897.

Solicitors for appellants: *Robbins, Billing & Co., for James Clarke, Preston.*

Solicitors for respondent: *Collyer-Bristow, Russell, Hill & Co.*

(1) (1699) Com. 72; 1 Salk. 241; 1 Lutw. 798.

[HOUSE OF LORDS.]

H. L. (E.) 1897 *May* 18, 20, 21; *July* 27.

SIMPSON . . . . . APPELLANT;

AND

THE MAYOR, &c., OF GODMANCHESTER AND ANOTHER . . . . . RESPONDENTS.

Easement—Opening Locks on River—Dominant and Servient Tenement—Prescription—Presumption of Legal Origin—Lost Grant—Prescription Act 1832 (2 *&* 3 *Will.* 4 *c.* 71) *s.* 2.

An easement, exercised for the benefit of the dominant estate, is not invalid merely because from the very nature of the right its exercise by the dominant estate confers some benefit upon other tenements.

The corporation of Godmanchester as owners of certain lands had for more than 200 years opened as of right the gates of certain sluices or locks belonging to the appellant upon the River Ouse in time of flood or likelihood of flood in order to prevent damage to those lands:—

Held, that the easement was good and was none the worse because the exercise of it also benefited lands belonging to other persons; and that the corporation could maintain their right either by s. 2 of the Prescription Act 1832 or by the fiction of a lost grant.

The decision of the Court of Appeal, [1896] 1 Ch. 214, affirmed.

THE appellant brought an action against the respondents claiming an injunction to restrain them from trespassing upon or interfering with his locks on the River Ouse. By riders A and B to their last amended defence the respondents alleged that the corporation of Godmanchester were before the date of the letters patent of December 11, 1638, and had ever since been the owners of certain hereditaments (referred to in the argument as the tenements in rider A) and had as such owners on their own behalf, or as trustees or agents for and on behalf of their tenants occupiers of the said hereditaments, or on behalf of the persons entitled to rights of common on the East and West Common allotments, or in all such capacities, and in fact had for 250 years or for much more than forty years before the acts complained of by the plaintiff, enjoyed as of right and without interruption the right of opening and keeping open the gates of the sluices or locks at Godmanchester, Houghton and

Hemingford mentioned in the statement of claim, in time of flood and upon every likelihood or appearance of flood in order to prevent damage or injury to the said hereditaments. The corporation claimed the easement or right to cause the waters of the River Ouse to pass through the said sluices or locks in time of flood, or likelihood or appearance of flood, for the benefit of the borough of Godmanchester and as a protection for the last-mentioned hereditaments and the owners and occupiers thereof, and they claimed to be entitled to the said easement or right as well by virtue of 2 & 3 Will. 4 c. 71 as under an indenture of December 3, 1689, or under some lost grant or lost grants thereof.

The evidence produced at the trial before Wright J. of the user of the right claimed by the corporation is stated in the judgment of Lord Watson. Wright J. dismissed the action, and this decision was affirmed by the Court of Appeal (Lord Herschell, A. L. Smith and Rigby L.JJ.). (1)

May 18, 20, 21. *A. Hopkinson Q.C.* and *E. R. Simpson* for the appellant. 1. When the appellant purchased the locks and navigation he had no notice of the deed of 1689, and the covenant as to opening sluices contained in that deed is not binding upon him: *Austerberry* v. *Corporation of Oldham.* (2) The deed does not purport to grant any right in respect of the tenements mentioned in rider A or any other tenements. The right purported to be granted by the deed is a right in gross, and Wright J. so held. Such a right could not be made appurtenant to the tenements mentioned in rider A any more than a public right of way could be made appurtenant to a tenement. A right appurtenant to the tenements in rider A would be an entirely different right.

2. Wright J. found that there was no evidence to shew that a right to open the lock gates was ever claimed by the defendant corporation as incident or appurtenant to the tenements mentioned in rider A or to any particular tenements, but that the evidence led to the conclusion that the acts of the corporation were done on behalf of the inhabitants of the borough

(1) [1896] 1 Ch. 214. (2) (1885) 29 Ch. D. 750.

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION.

generally, that is that the user was of a right in gross. The Court cannot *presume* the opening of the lock gates to have been done in respect of the tenements in rider A or any of them, because that would be presuming the evidence to have been different from what it actually was. Nor can the Court select part of the user and reject the rest: *Hammerton* v. *Honey* (1); *Lord Rivers* v. *Adams* (2); *Blewitt* v. *Tregonning*. (3) It is, no doubt, the duty of the Court to attribute a legal origin to long-continued user if a legal origin for that user is possible, but to refer the user to any other right than the one in respect of which it was actually exercised would be unjust.

3. The enjoyment by the defendant corporation has not been "as of right," i.e. of such a nature that its origin could be referred to nothing but some right: see *Fellowes* v. *Clay*. (4) So far from the enjoyment being referable to a grant in respect of the tenements mentioned in rider A or any of them, it is not referable to a grant at all, but is referable either to the deed of 1689 or to the permission of the navigation owner.

4. The right claimed by the defendant corporation is not an easement and could not be granted. An easement is a right "appurtenant" to a tenement, and its exercise at once identifies the tenement to which it is appurtenant. The opening of the lock gates points to no particular tenements or tenement, and is not "appurtenant" to any tenement. A right cannot be "appurtenant" to a tenement unless that tenement forms a limit to and measure of the burden of the right on the servient tenement. This is so in the case of all known easements and profits a prendre, and wherever it has not been the case the right has been held bad: see *Baylis* v. *Tyssen Amherst* (5); *Ackroyd* v. *Smith* (6); *Webb* v. *Bird* (7); Gale on Easements, 6th ed. pp. 4, 66, 492, and the cases cited there. In order that an easement of sending water over a tenement may exist the water must come from the dominant tenement, and from that tenement *only*; otherwise there would be no limit to the burden

(1) (1876) 24 W. R. 603.
(2) (1878) 3 Ex. D. 361.
(3) (1835) 3 A. & E. 554.
(4) (1843) 4 Q. B. 313, 355.
(5) (1877) 6 Ch. D. 500.
(6) (1850) 10 C. B. 164.
(7) (1861) 10 C. B. (N.S.) 268; (1863) 13 C. B. (N.S.) 841.

of the right on the servient tenement. To hold that the dominant tenement need not form a limit to or measure of the burden of an easement on the servient tenement would reduce the dominant tenement to a mere ornament and give rise to absurd results. The easement was bad, being exercised for the benefit of tenements not belonging to the corporation.

The right claimed is too vague to constitute a legal right. The terms "in time of flood" and "likelihood or appearance of flood" are incapable of legal definition. So also is the expression "when there is a danger of any flood at Godmanchester or the lands *near* thereto": see *Wilkes* v. *Broadbent*. (1) No case can be cited in which such a right as that claimed in the present case or any similar right has been held to be an easement. The respondents' counsel admit it to be a novelty. It was long ago laid down that no new easement could be created: see *Keppell* v. *Bailey* (2) and *Hill* v. *Tupper*. (3)

Crackanthorpe Q.C. and *Method* for the respondents were not heard.

The House took time for consideration.

July 27. LORD WATSON. My Lords, although there is a considerable amount of evidence, oral and documentary, the material facts of this case hardly admit of dispute. The reiterated arguments of the appellant's counsel have failed to satisfy me that the inferences derived from these facts by Wright J. and by the Court of Appeal are in any respect erroneous.

By letters patent from the Crown, dated December 11, 1638, certain rights of navigation in the River Ouse, between St. Ives and St. Neots, were granted to Arnold Spencer, who had previously spent considerable sums in making that part of the river navigable, and his heirs and assigns. In virtue of the powers conferred upon them, the grantees have maintained three locks upon the river, with gates or sluices, to which the present action relates, one of these being at Godmanchester, another at Houghton, and a third at Hemingford. It appears that all these locks had been erected and existed in some form

(1) (1744) 1 Wils. 63. (2) (1834) 2 My. & K. 517.
(3) (1863) 2 H. & C. 121.

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION. Lord Watson.

or other long before the year 1689, and that they were reconstructed in an improved shape about the year 1834. It also appears that these locks, when closed, did not raise the flow of the river above the level at which it had been previously kept by old mill-dams in their vicinity, which extended across the channel.

The respondents, the corporation of Godmanchester, are the owners of lands abutting upon or adjoining the River Ouse, which are liable to be submerged when the river is in flood. Some of these lands are and have been occupied by the corporation for municipal purposes; others have been in use to be let to tenants; whilst between four and five hundred acres, forming the common lands of the borough, have been used and occupied, partly by the corporation, in the exercise of rights reserved to it, and partly by corporators who are burgesses of Godmanchester, and live in a commonable house.

It is established by a large and consistent body of evidence, and it has not been seriously disputed, either in the Courts below or at the Bar of the House, that the corporation have been in use, for a period extending far beyond the years of prescription, continuously, without interruption and as matter of right, to open the gates or sluices of the locks already mentioned whenever a flood was imminent, with the object and result of permitting the flood-water to escape down the river. The appellant maintained, in argument, that the practice had its origin in, and dates from so early a period as, the year 1689. Recent evidence, going back for more than forty years, shews conclusively that the sluices were opened by the corporation for the purpose of draining or protecting from inundation those lands and tenements which are vested in them. There are a series of entries in the books of the corporation, beginning in 1736 and ending in 1893, which appear to me to shew that during the whole of that period the sluices were regularly opened in times of flood, and for the same purpose as in more recent times. Prior to 1736 there are two entries—one in 1713, and another so early as 1648; and the latter of these, taken in connection with documentary evidence, to which I shall have subsequent occasion to refer, leads in my opinion

to the inference that the practice began and was followed as matter of right by the corporation a considerable time before the year 1689.

The appellant, in February, 1893, acquired by purchase the entire rights of navigation which had been granted to Arnold Spencer and his heirs and assigns by the letters patent of 1638. He brought the present suit in November, 1894, in which he claims an injunction to restrain the corporation, their agents, servants, and workmen, from trespassing upon, forcing open, or otherwise interfering with or injuring his locks at Godmanchester, Houghton, and Hemingford, or either of them, and also a decree for damages. After proof had been taken, the action was dismissed with costs by Wright J., whose order was unanimously affirmed by the Court of Appeal.

The argument addressed to us for the appellant was of a very discursive character; but the main, if I may so call them, and certainly the only, points deserving notice, which were advanced and repeated in a great variety of shapes, were these three: (1.) that the right which has been exercised and is now asserted by the respondent corporation is truly in the nature of a right in gross, and cannot be the subject of a proper easement; (2.) that an easement of the nature said to have been exercised by the corporation, and such as is now claimed by them, cannot be legally constituted in favour of the lands vested in the corporation as the dominant tenement, inasmuch as other lands than those of the corporation, to which no such easement is attached, are benefited by its exercise; and (3.) that the exercise of the right claimed by the corporation is solely attributable to an indenture of 1689, between them and the then owner of the navigation; and that the transactions embodied in that deed constitute a personal contract which is not binding upon the appellant, who purchased for value the right of navigation without notice of its existence.

I failed to appreciate at the time, and even now I am not certain that I understand, the reasoning by which the appellant endeavoured to shew that the right exercised by the corporation was in the nature of an easement in gross. It was not disputed that the right to open a sluice upon the servient land of another

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION. Lord Watson.

person may be legally conferred upon the owner of a separate and dominant tenement for the purpose of enabling him to relieve his dominant lands of flood-water. In this case all these requisites are to be found. The servient estate consists of these three sluices (which he maintains for the purpose of the navigation) and the navigable water upon which they operate. The dominant estate consists of the municipal property which is vested in the respondents; and the right which they claim has, according to the evidence, invariably been exercised in the interest and for the benefit of that estate, and not in the interest and for the benefit of any other estate or its proprietor. If the appellant had been able to shew that the corporation had carried their operations beyond what was necessary to protect their own lands, so as to clear other lands of flood-water when their own were neither flooded nor threatened with inundation, the appellant would have been entitled to restrain the respondents from doing more than was reasonably necessary in order to protect their dominant lands. But he has made no such complaint; and there is no evidence in this case which could support it.

The second point appeared to me to be equally devoid of substance. It was broadly and boldly maintained that no burden imposed upon a servient tenement, however beneficial to the dominant estate, can in law be regarded as an easement, if its exercise for the benefit of the dominant estate has the effect of conferring some benefit upon some other land which is not included in that estate and has no similar right of easement. In the case of many easements it is from their nature possible to confine their benefit to the dominant tenement; but in cases where the easement relates to water, or to light and air, it would be simply impossible to do so. If the law were as contended for by the appellant, a servitude right to take water from the lands of A. for the use of the lands of B. could not be acquired either by grant or prescription, if, owing to the position and levels of the lands of B., it were necessary to discharge the water, or its surplus, into the lands of C., to the advantage of their owner or occupant. In like manner there could be no servitude of light and air in favour of the windows of a par-

ticular house, if the maintenance of the right happened to be of some advantage to the windows of an adjoining house which did not participate in the easement. But the proposition is as destitute of foundation in authority as it is, in my opinion, unreasonable. It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement, which is serviceable and beneficial to that estate, shall cease to exist whenever from the very nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands or tenements. The appellant's counsel, as might have been expected, cited no decision in support of their doctrine and no judicial opinion in which it was discussed.

The third contention of the appellant was based upon the terms of a deed of indenture executed upon December 3, 1689, by which the corporation, on the one hand, conveyed to Henry Ashley, who at that time was vested in one moiety of the navigation rights now belonging to the appellant, a small parcel of land at the end of the old mill-dam of Godmanchester upon which the Godmanchester Lock had previously been constructed. The parcel thus conveyed had been leased by the corporation on December 12, 1676, for the term of nineteen years, and the lease bears to be of the land "together with the sluice thereupon lately erected and planted." The conveyance of 1689 expressly reserves to the corporation and their successors, and to the freemen and burgesses inhabiting the borough of Godmanchester, "the free use and enjoyment of all and all manner of liberties franchises privileges and immunities which they and their predecessors have hitherto had, used and enjoyed without the lett, suit, hindrance or denial of him the said Henry Ashley, his heirs executors administrators or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them." On the other hand, Henry Ashley, for himself, his heirs, executors, administrators and assigns, did covenant, promise, agree, and grant to the corporation and their successors, that he and they should in all time coming, and as often as need be, repair and uphold the sluices

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION. Lord Watson.

and piece of ground conveyed, so that the corporation and their successors and their tenants and farmers of Godmanchester Water Mills should not suffer loss or damage. He in the same terms covenanted, promised, agreed, and granted that it should be lawful "to and for the miller of the said Godmanchester Mills for the time being, and in his default or omission for such person or persons, officer or officers, as shall be thereunto appointed by the bayliffs of Godmanchester for the time being for ever hereafter, upon every likelihood or appearance of any flood or outrage of water, to sett open and to keep open, or else to take off the gates of the aforesaid sluices, and also all the gates of the sluices in or near Houghton, and also the gates of the sluices in or near the Milnes in Hemingford Grey in the said countie of Huntingdon, and lay them upon the land by the side of the said sluices until the water be fallen and the floods well abated."

The appellant, founding upon the terms of that deed, argued that it necessarily contains and constitutes the origin of the corporation's right to open the locks in question in times of flood, and that the practice, which he admits has prevailed, at such times since the year 1689 must be attributed to it. He therefore contends that the contract obligations which Henry Ashley imposed upon himself and his heirs and assigns are no longer enforceable against him by the corporation, because he, although an assignee to all the rights of navigation, is a purchaser without notice. I am not concerned to dispute the rule upon which the appellant relies; but I am not satisfied that, in the circumstances of the present case, it has any application. I am of opinion that the deed of 1689 was not the origin of the right, and that the whole of its provisions and stipulations, which either expressly or by reasonable implication relate to the opening of the sluices, point to that conclusion. I think the object of these provisions and stipulations was, not to create any new right in the corporation and burgesses of Godmanchester, but to secure them in the enjoyment for the future of a privilege which they had enjoyed as matter of right in times past.

The covenant or grant (for it is described in both ways) by

Henry Ashley to permit in all time coming the miller at Godmanchester, or any other person duly authorized by the bailiffs of the borough, to open the sluices there, and at Houghton and Hemingford, when the state of the river rendered it necessary, does not stand alone. It is tacked on to, and is obviously meant to supplement, the reservation by the corporation, to itself and its freemen and burgesses, of the right to use freely all the liberties and privileges which they had until that time used and enjoyed without the hindrance or denial of Henry Ashley or any other person in right of the navigation. To my mind the inference is clear, that the most important, if not the only, right meant to be reserved was the privilege of keeping the lands of the borough, whether occupied by its corporation or by its burgesses, free from inundation, by exercising a control over the sluices of the navigation owners during times of flood. The fact that there is not a scintilla of evidence to shew that the right of the corporation has ever, before the present action was brought, been ascribed by any one to the indenture of 1689, tends to confirm that inference.

In the view which I take of the third branch of the appellant's argument, the indenture of 1689 cannot be regarded as a covenant constituting the right of the corporation, or as affording the measure of that right. It is a document which, to my mind, does nothing more than recognise that there was an existing right of servitude which the parties did not intend to disturb—a right resting upon continuous enjoyment by the corporation, in its own interest and that of its burgesses, in virtue of possession which had never been disputed or resisted by the owners of the navigation; and that right has since been confirmed, by unchallenged possession, for more than 200 years. I therefore move that the order of the Appeal Court appealed from should be affirmed with costs.

My noble and learned friend the Lord Chancellor asks me to state that he approves of the views which I have expressed in delivering judgment, and that he also concurs in the judgment which is about to be delivered by my noble and learned friend Lord Davey.

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION.

LORD SHAND. My Lords, I also am of opinion that the judgment of the Court of Appeal should be affirmed and this appeal dismissed. I have had an opportunity of considering not only the judgment which has now been delivered by my noble and learned friend Lord Watson, but also that which my noble and learned friend Lord Davey is about to read, and I entirely adopt the grounds of judgment which are stated by those learned Lords.

LORD DAVEY. My Lords, this case is an illustration of the inconvenience arising from the laxity of pleading permitted by modern practice. If the present respondents had been obliged to state their case with legal precision in their defence, I believe that a great deal of uncertainty and expenditure of time at the trial might have been avoided. After the trial had lasted for four days it was adjourned for more than a month to enable the respondents to formulate the easement which they claimed, and it was only then that they put their claim into a formal legal shape. By their re-amended defence the respondents say that, as owners of certain hereditaments, they have on their own behalf or for or on behalf of their tenants, occupiers of the said hereditaments, or on behalf of the persons entitled to rights of common on the east and west common allotments for 250 years, or for more than forty years before the acts complained of by the plaintiff, enjoyed as of right and without interruption the right of opening and keeping open the gates of the sluices or locks at Godmanchester, Houghton, and Hemingford in time of flood or upon every likelihood and appearance of flood in order to prevent damage or injury to the hereditaments mentioned. And they claim such easement as well by virtue of the Prescription Act as under the deed of December 3, 1689, or under a lost grant.

There is really no dispute as to the facts, and the only question is whether in law the facts established the title of the respondents to the easement claimed by them. That the corporation have lands part of their ancient possessions which are exposed to floods is not denied. The extracts from the books of the corporation shew that, from the beginning of the

eighteenth century at least, and probably earlier, the corporation have been in the habit of opening the sluices to let go the water in time of flood, and on various occasions have asserted their right to do so against persons who shut down the sluice-gates which had been opened by their order. The entries relied on for the purpose of shewing that it was done by permission of the owners of the navigation appear to me to indicate the contrary. In these circumstances every presumption ought to be made in support of the usage.

The arguments on behalf of the appellant have covered rather a wide range, and I am sure that the appellant's counsel did full justice to their client's case. In substance the appellant's points seem to be—(1.) that the easement claimed by the corporation is too wide, and not sufficiently connected with the enjoyment of their lands; (2.) that it is not shewn to what lands in particular it is claimed as appurtenant; and (3.) that the proper inference from the evidence is that the exercise by the corporation of the alleged easement was under the written agreement contained in the deed of 1689.

My Lords, I cannot doubt that the easement, as finally alleged by the respondents, was a good easement in law. It is, in fact, a claim to divert the water which either has flooded or, if undiverted, would flood their lands, and to come on the appellant's land for the purpose of regulating the flow of the water with that object. It appears to me directly connected with the enjoyment of the respondents' lands by the occupiers thereof. The appellant, however, argues that the right claimed is to protect, not only the respondents' lands, but the lands of other proprietors from floods. The answer is: That is not the right claimed, and we are not here dealing with any excess in the exercise of the easement, but with the question whether the corporation have the right which they claim.

The appellant's counsel quoted several cases, of which *Ackroyd* v. *Smith* (1) may be taken as an example. It was there held that you cannot annex to land rights by way of

(1) 10 C. B. 164.

H. L. (E.) 1897 SIMPSON v. GODMANCHESTER CORPORATION. Lord Davey.

easement unconnected with the enjoyment of land, as ex. gr. a right of way to be used for all purposes. There is no doubt about this sound principle of law; but it appears to me to have nothing to do with the present case, in which the claim of right is only for the protection of the respondents' own lands. If the appellant means that the exercise by the respondents of their easement has the effect of also protecting the other lands in the district, that probably is so from the nature of the case. But it is no objection to the exercise of a lawful right, that it may indirectly benefit other persons or subjects which do not enjoy the same right. If I have one ancient light in my house, I can prevent my opposite neighbour from building on his land so as to obstruct that window, and thereby gain the benefit of an unobstructed access of light to my other windows which are modern, or my next-door neighbour may be benefited by the opposite land not being built on, although he has no right.

This was decided in *Tapling* v. *Jones*. (1) Lord Cranworth there says (2): "The plain principle seems to me to be that no one can interfere with the absolute and indefeasible right of another unless where such interference is made necessary by the wrongful act of the person possessing the right."

The easement is claimed as appurtenant to all the ancient possessions of the corporation, including the east and west common lands, all of which are more or less benefited. For the purpose of defence it is not necessary for the respondents to say whether it can be claimed as appurtenant to all these lands, as it is admitted that they have some lands which are protected from flood-water by the exercise of the easement. But I ought to say that I see no difficulty in the corporation prescribing, as owners of the soil of the commons (as they seem to be), on behalf of themselves and all other the persons having rights of common there. Nor do I regard the fact that the commons lie below Godmanchester Lock as presenting any difficulty. It is quite conceivable that the regulation of the flow of water through the upper lock, and the prevention of

(1) 11 H. L. C. 290. (2) 11 H. L. C. at p. 314.

flood water accumulating above that lock, may be of the utmost importance to the lands below, and, indeed, that this is so is shewn by the evidence of Mr. Hunnybun.

It is not, perhaps, very important whether the easement is claimed under the Prescription Act or by the fiction of a lost grant. But I agree with the opinion expressed by Lord Selborne in *Dalton* v. *Angus* (1), that the 2nd section of the Act is not confined to rights of way and watercourses, but includes easements of every description, notwithstanding the contrary opinion expressed by Erle C.J. in *Webb* v. *Bird*. (2) As this easement has been enjoyed for upwards of forty years, it is therefore absolute and indefeasible "unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." The appellant says it has, and his counsel put their argument in this way. They say that the covenant contained in the deed of December 3, 1689, was binding, not only upon the covenantor at law, but also in equity on every assign from him who took with notice of the covenant, upon the principle of *Tulk* v. *Moxhay*. (3) I assume, without deciding, that this is so. But they further say it must be presumed that every owner of the navigation before the appellant had notice of the covenant, while it is proved that the appellant bought without notice. I do not think any such presumption ought to be made. The words of the statute are, "unless it shall appear," &c., and I think that the burden of proof is on those who set up a written consent in opposition to an otherwise absolute and indefeasible right. The appellant offered no evidence in support of his suggestion, as he perhaps might have done, by calling the late or some former owners of the navigation, and matters capable of proof ought not to be presumed. As a matter of fact, I see no reason to suppose (if one is to guess) that the deed of 1689 was either the commencement or the origin of the right claimed by the corporation, and I entirely concur with what was said by my noble and learned friend Lord Watson on the effect and construction of that deed.

(1) 6 App. Cas. 740, at p. 798. (2) 10 C. B. (N.S.) 282.
(3) (1848) 2 Ph. 774.

H. L. (E.) 1897

SIMPSON v. GODMANCHESTER CORPORATION.

For these reasons I am of opinion that the appeal should be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 27, 1897.

Solicitors for appellant: *Batten, Proffitt & Scott.*
Solicitors for respondents: *Grubbe & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1897

July 6.

THE BIRMINGHAM VINEGAR BREWERY COMPANY, LIMITED . . . . } APPELLANTS;

AND

POWELL . . . . . RESPONDENT.

Trade Name—Common Law Right—Name indicating Manufacturer—Imitation of Rival Traders' Goods—Fraud.

The respondent had for years manufactured and sold under the name "Yorkshire Relish" a sauce made according to a secret recipe, and the term "Yorkshire Relish" had come to mean that particular manufacture. The appellants began to make a sauce, nearly resembling the respondent's sauce, which they sold as Yorkshire Relish so as to induce purchasers to believe that it was the respondent's "Yorkshire Relish," although the purchasers did not in fact know the name of the respondent in connection with the sauce:—

Held, that the respondent was entitled to an injunction restraining the appellants from using the words "Yorkshire Relish" in connection with their sauce without clearly distinguishing it from the respondent's sauce.

The decision of the Court of Appeal, [1896] 2 Ch. 54, affirmed.

THE respondent, trading under the name of Goodall, Backhouse & Co., had for many years manufactured and sold under the name "Yorkshire Relish" a sauce made according to a secret recipe, and the name "Yorkshire Relish" had come to mean the respondent's manufacture. The appellants began to make and sell a sauce with the words "Yorkshire Relish" on the bottles and wrappers so as to induce purchasers to believe that it was the respondent's manufacture, though some of the

purchasers did not in fact know the name of the respondent in connection with the manufacture. Stirling J. granted an injunction restraining the appellants from using the words "Yorkshire Relish" as descriptive of or in connection with their sauce without clearly distinguishing it from the respondent's. This decision was affirmed by the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.) (1)

The contest on this appeal was whether the evidence justified the conclusions of fact that the term "Yorkshire Relish" meant the respondent's manufacture, and that the purchasers were deceived. No principle of law was in dispute.

July 2, 5, 6. *Moulton Q.C.* and *Buckley Q.C.* (*J. F. Waggett* with them) for the appellants.

Graham Hastings Q.C., *John Cutler Q.C.*, *Hampson*, and *James Roberts* for the respondent were not heard.

LORD HALSBURY L.C. This case appears to have occupied seven or eight days at the original trial; it has now lasted into the third day of argument before your Lordships, and yet it appears to me that the propositions involved in it are of a very simple character, and the questions which arise susceptible of a very simple answer.

The proposition of law is one which has been accepted by the highest judicial authority and acted upon for a great number of years. It is that of Turner L.J., who says in *Burgess* v. *Burgess* (2): "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Turner L.J. is if he were to say in terms, "These are the goods manufactured by" a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of

(1) [1896] 2 Ch. 54. (2) (1853) 3 D. M. & G. 204.

H. L. (E.) 1897

BIRMINGHAM VINEGAR BREWERY COMPANY v. POWELL

Lord Halsbury L.C.

trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public. In each case it comes to be a question whether or not there is the statement made; and if the statement is made there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have read from Turner L.J.

Now, my Lords, in this case we have a singular course of argument adopted. The gentleman who is complaining before your Lordships has invented a sauce which he calls by the name "Yorkshire Relish." He has invented it, and he has carried on the business of selling it for a great number of years. It is not denied that under that name it has a reputation in the market which has made it a popular thing, and that people buy it freely. Now it is said on behalf of the defendants as a first proposition of fact that there is no representation that what they sell is the manufacture of the original inventor by calling it "Yorkshire Relish," because it has become a well-known commercial article, and calling it by that name merely means that it is that thing. We have had a very long argument on that subject. My Lords, the first objection that can be advanced against that argument is that it is not true. As a matter of fact this is not the well-known article. The composition of the well-known commercial article is a secret. The exclusive manufacture of it is by the person who knows the secret, and nobody else can manufacture it because they do not know how it is made. It is obvious, therefore, that the first proposition of fact which is supposed to encounter the plaintiff's right is displaced by the existing state of the evidence. As to

that there really is no conflict in the evidence in this case. Upon the question of whether or not it is identical I will not say that "counsel has been darkened by many words," but as a matter of fact we have had a long disquisition as to the difficulties of knowing what exactly is thought of in the mind of a purchaser when he purchases a bottle of this "Yorkshire Relish." But, without going into that interesting discussion, it is obviously true that the thing that is bought does not simply consist of something or another which has a particular taste. Its reputation may depend upon whether (as I think it has been suggested more than once in the course of the argument) it is wholesome, and whether it assimilates well with the digestion, and so on.

Without going through all these points it is sufficient that the thing that the person who buys it desires to have is "Yorkshire Relish." Now, the thing that is sold as Yorkshire Relish is not Yorkshire Relish in the sense of its being the same chemical composition, in the sense of its having the same taste, in the sense of its being so properly assimilated to the preferences of the persons who take it either in smell or taste as the original composition is. If that is so, how can it possibly be contended as a matter of fact that a person who is selling this thing as "Yorkshire Relish" is entitled to do so because it is a well-known commercial article, and because he is only selling a well-known commercial article by the only name by which it is known? I have had myself very great difficulty in following the line of reasoning which has been submitted to your Lordships upon that part of the case. It is enough for me to say in regard to the particular facts here which are supposed to be in conflict that there is no real conflict at all to my mind. Answering the question of fact as the learned judges who have dealt with this question before have answered it, I am satisfied that a person who puts forward this "Yorkshire Relish," made as it is by the present defendants, is representing it as being a particular manufacture. It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants Yorkshire Relish to which he has been accustomed,

H. L. (E.) 1897

BIRMINGHAM VINEGAR BREWERY COMPANY v. POWELL.

Lord Halsbury L.C.

and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not Yorkshire Relish in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other.

But then it is said that may give the purchaser a right to bring an action; but the present plaintiff has no right to intervene in the transaction between the parties. All I can say is that that is a proposition which probably might have been established if it were true in every one of the cases which have been before the Courts, and I never heard of such a proposition before. On the contrary, the rule of law has been that if you choose to state that which is false and induce another person to deal with you by that falsehood, and so deprive the original maker of the trade which otherwise he would get, that is an actionable wrong, and gives rise to the right to an injunction.

My Lords, I protest against going through all this evidence and going through all these different hypotheses of what might or might not arise in a case of this sort when the very simple proposition is established, as it is to my mind conclusively by the evidence here, that in this particular case there is the representation that the article is made by the rival manufacturer when in fact it is not, and that the thing is not that which it purports to be, and that the effect of that is to deprive the plaintiff of some trade which otherwise he would get. Those three propositions being established as a matter of fact, I decline to go into all the questions which might arise upon another condition of facts in order to consider what would be the law applicable to them if the present condition of facts did not exist.

I certainly do deprecate the enormous, inordinate, and unreasonable length to which this case has been protracted, when, as I say, it appears to me that the proposition of law is a very plain one, and the facts not really in dispute establish the proposition beyond all reasonable doubt.

My Lords, I move that this appeal be dismissed with costs.

LORD WATSON. My Lords, I am of the same opinion.

The argument in this case, as is too common in cases of a similar class, has been exceedingly discursive. The only rule of law involved in the case appears to me to be this—that the appellants have no right to sell the sauce which they manufacture as the goods of the respondent. That is a proposition which does not appear to me, in the circumstances of the present case, to admit of any serious dispute, and I can hardly say that it has been seriously disputed.

That being so, the only question to be disposed of is a question of fact. Have the appellants sold their goods in the market so as to represent them as being the goods of the respondent? To that question the learned judge who tried the case, and three learned Lords Justices in the Court of Appeal, have been unanimous in returning an affirmative answer. I should certainly without strong cause shewn hesitate to differ from the concurrent judgments of those two tribunals upon a matter of fact. But I am relieved from the necessity of doing so, because I am bound to say that those portions of the evidence which were brought under our notice by the learned counsel for the appellants appeared to me to confirm the conclusions the learned judges had arrived at.

LORD HERSCHELL. My Lords, I am of the same opinion, and I shall add a very few words only.

I think that the fallacy of the appellants' argument rests on this: that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shewn that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case it seems to me that "Yorkshire Relish" meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a

H. L. (E.) 1897

BIRMINGHAM VINEGAR BREWERY COMPANY v. POWELL.

Lord Herschell.

particular manufacture, and that when a person sold "Yorkshire Relish," as the defendants did, by selling it as "Yorkshire Relish" and calling it "Yorkshire Relish," they represented to the public that it was that manufacture which was known as and by the name of "Yorkshire Relish."

It was said on behalf of the appellants that they had a right to sell what they manufactured, and to call it "Yorkshire Relish," because "Yorkshire Relish" had come to be merely the name of a particular sauce with a particular flavour. I do not think that that is an answer which can in point of fact be set up in the present case. I do not enter upon the question whether it would have been sufficient in point of law if it had been established in point of fact. But here what they sell and put on the market is not "Yorkshire Relish" in the sense in which those words had been used down to that time and would be understood by anybody. It may have been something very like it—a "good match," and so on—but it was not "Yorkshire Relish." When, therefore, they sold their goods as "Yorkshire Relish," they sold them as the plaintiff's manufacture when they were not the plaintiff's manufacture, nor the article which he manufactured and sold under that name.

For these reasons, my Lords, I am of opinion that the judgment should be affirmed.

LORD SHAND. My Lords, I agree in thinking that this case really raises no question of law. The law has been admitted on the part of the appellants to be beyond question: that no trader is entitled to pass off his goods as the goods of another, and so acquire profits which that other would or might earn. In the present instance, in two courts it has been held as a matter of fact by all of the judges who have considered the case that the defendants have in point of fact been passing off goods manufactured by them as goods of the plaintiff; and having heard the evidence read, I concur in that opinion.

[His Lordship discussed the facts, and came to the conclusion that the use of the term "Yorkshire Relish" appeared to be a representation that the article sold was the article made by the respondent.]

LORD DAVEY. My Lords, when once the facts of this case are fully grasped, it does not appear to me to present any great difficulties for our decision. The plaintiff, the respondent in this appeal, has a secret recipe for making a sauce or relish for food which he and his predecessors in the trade have sold for thirty-four years under the name of "Yorkshire Relish." The appellants' contention is, if I understand it rightly, that the respondent has no monopoly of the manufacture, and that all the world may manufacture his goods if they can, and if they can succeed in manufacturing the goods, they are entitled to call them by the only name by which those goods can be described. Now, my Lords, I do not find it necessary to say much as to the legal validity of the appellants' argument as I have described it; it fails in fact. The appellant does not pretend that he has discovered the respondent's secret, or that his goods are made according to the same recipe. All he says is that they are substantially identical with the respondent's, or a "wonderful match." Other words are used indicating a close similarity between the two sauces; but it is not pretended that the appellants' sauce is made of the same components or made in the same way, although it is said that it produces much the same result. The appellants, therefore, are misrepresenting the real character of their goods when they call them "Yorkshire Relish." They are not in fact "Yorkshire Relish," though I will assume they closely resemble that compound.

If this be so, your Lordships are relieved from the consideration of what would be the right of the appellants if they were in fact selling the same goods as the respondent. I do not find it necessary or desirable to express any opinion upon that question. I will only say, as at present advised, I see no reason to differ from the opinion expressed by Fry J. in *Siegert* v. *Findlater* (1), or that expressed by Lindley L.J. in his judgment in the present case, in which his Lordship says: "Again, if a person makes an article not patented, and gives it a certain name by which the article comes to be known in the market, any one who can make the same kind of article can

(1) (1878) 7 Ch. D. 801.

H. L. (E.) 1897

BIRMINGHAM VINEGAR BREWERY COMPANY v. POWELL.

Lord Davey.

call it by the name by which it is known, if he can in fact do so without passing off his goods for those of the original maker."

My Lords, so long as the respondent can succeed in keeping his secret, he is in fact the sole manufacturer of "Yorkshire Relish" in the market, and the appellants' act of selling their goods as "Yorkshire Relish" when they are not "Yorkshire Relish" is a fraud upon the public and amounts, in my opinion, to a representation that the goods are goods of which the respondent is the sole manufacturer.

In my opinion, my Lords, the case is correctly summed up by Kay L.J. (1) in words which I will take the liberty of reading to your Lordships: "The defendants made a sauce which it is said closely resembles that of the plaintiff in appearance, in chemical ingredients, and in flavour, and it is described by one of the chemical experts who have given evidence as 'a wonderful match.' But as the defendants do not know the recipe of the plaintiff, nor the manner in which the ingredients are compounded, it is impossible to say that the two sauces are the same. The defendants are, therefore, selling a different sauce by a name which, by itself, would be calculated to induce purchasers to believe that it is the plaintiff's sauce."

That, my Lords, seems to me the whole of the case, and I entirely agree in the judgment which has been proposed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 6, 1897.

Solicitors for appellants: *Thorowgood, Tabor & Hardcastle, for Cooper & Co., Newcastle, Staffordshire.*

Solicitor for respondent: *Salaman.*

(1) His Lordship read the passage from the shorthand-writer's note of the judgment of Kay L.J. as printed in the appendix to the cases of the appellants and respondent.

[PRIVY COUNCIL.]

Ex parte EDITH MAY HALLOWELL CAREW.

J. C.*
1897
July 14.

ON APPEAL FROM HER MAJESTY'S CONSULAR COURT, JAPAN.

Practice—Special Leave to Appeal in Criminal Cases—Consular Court in Japan—Jurisdiction—Foreign Jurisdiction Act (6 & 7 *Vict. c.* 94).

Under the Foreign Jurisdiction Act (6 & 7 Vict. c. 94) Her Majesty has power to constitute for Japan a Court by Order in Council with a jury of five with jurisdiction over Her Majesty's subjects.

The rule as to special leave to appeal in criminal cases laid down in *In re Dillet*, (1887) 12 App. Cas. 459, re-affirmed.

THIS was a petition for special leave to appeal from a verdict, sentence, and conviction dated February 1, 1897, of the above Court.

The petitioner stated in her petition that on that date she was convicted of the wilful murder of her husband before the judge of the said Court by a jury of five persons and sentenced to death, which was afterwards commuted to a sentence of imprisonment with hard labour for life by Her Majesty's Minister at Tokyo, acting under clause 69 of the Order in Council dated March 9, 1865. (1)

Sir F. Lockwood, Q.C., and *Macnaghten*, for the petitioner, submitted that by the laws of England no natural-born British subject can be tried or convicted of any capital or other felony in any of Her Majesty's Courts except by the verdict of twelve men. An Act of Parliament alone can deprive the petitioner of the right to be so tried. Reference was made to the Order in Council of March 9, 1865 (1), and the later order of August 14, 1878. (2) By those orders the Crown erroneously assumed to be empowered to alter the law as to the constitution of the tribunal empowered to try British subjects in Japan. Reference was

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, SIR HENRY DE VILLIERS, and SIR HENRY STRONG.

(1) 12 Hertslet, 281, 296. (2) 14 Hertslet, 246.

J. C. 1897 CAREW, *Ex parte.*

also made to the Foreign Jurisdiction Act (6 & 7 Vict. c. 94), s. 1, and to the amending Act 41 & 42 Vict. c. 67; and it was contended that the verdict of five men was null and void, and that the verdict and sentence ought to be set aside and quashed.

They also submitted that there had been misdirection and misreception of evidence in manner as stated in the petition.

[But LORD HALSBURY L.C. referred to *In re Dillet.* (1)]

The judgment of their Lordships was delivered by

LORD HALSBURY L.C. Their Lordships are of opinion that this is not a case in which it would be desirable or proper, or within the ordinary course of this Board, to give special leave to appeal.

Their Lordships have no doubt whatever that Her Majesty had full jurisdiction to establish the Court, and to constitute the Court in such a way as the Court has in fact been constituted, namely (vide China and Japan Order in Council, 1865), with a jury of five. In truth the objection, if it were a reasonable and arguable objection, would go to the existence of any Court at all. It is manifest that the language of the statute (the Foreign Jurisdiction Act, 6 & 7 Vict. c. 94) was intended to remove any doubt which there was, if there was a doubt, as to Her Majesty's jurisdiction to establish Courts by Order in Council under the circumstances of this case. The statute has placed it beyond doubt, because it uses in terms the phrase that Her Majesty shall have as ample jurisdiction as though she had obtained the jurisdiction by cession of territory or conquest; and it is familiar law, which cannot now be denied, that a conqueror has a right to impress on conquered territory what system of jurisprudence he pleases. The statute has removed any doubt which might have been entertained on the subject as to whether such rights extended to the jurisdiction over the Queen's own subjects; and therefore their Lordships are of opinion that the jurisdiction is well founded.

With reference to the other questions which Sir Frank Lockwood attempted to argue, it is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a

(1) 12 App. Cas. 459.

J. C. 1897 CAREW. *Ex parte.*

criminal investigation is not granted by this Board. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of the argument: *In re Dillet* (1): "Her Majesty will not review or interfere with the course of criminal proceedings unless it is shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." No such case has been made out here; and there are other objections not within the description of objections which this Board will entertain for the purpose of admitting an appeal.

Under these circumstances their Lordships will humbly advise Her Majesty that leave to appeal should not be granted.

Solicitors for petitioner: *Bridges, Sawtell & Co.*

(1) 12 App. Cas. 459.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1897, will be as follows :—

In the First Series,
[1897] 1 Ch. [1897] 2 Ch.

In the Second Series,
[1897] 1 Q. B. [1897] 2 Q. B. [1897] P.

In the Third Series,
[1897] A. C.

INDEX.

ADJOURNMENT—Power of chairman to refuse, of a meeting - - - **268**
See PRIVY COUNCIL APPEALS. 17.

ADMINISTRATION — Valuation of testator's estate—Bank shares - - **214**
See PRIVY COUNCIL APPEALS. 22.

ADMIRALTY.
See Cases under SHIP.

ADMISSIBILITY — Parol evidence — Written agreement - - - - **540**
See PRIVY COUNCIL APPEALS. 19.

AGENT—Debenture-holders—Liability for goods ordered by receiver - - **575**
See COMPANY. 3.

—— Policy—Duties of insurers' agent - **499**
See PRIVY COUNCIL APPEALS. 6.

AGREEMENT—Admissibility of parol evidence
See PRIVY COUNCIL APPEALS. 19. **540**

—— Construction—Proviso—Monopoly of supply
See PRIVY COUNCIL APPEALS. 9. **515**

AIR—*Right to uninterrupted current of Air—Stagnation of Air—Nuisance—Injunction.* CHASTEY *v.* ACKLAND - - - **H. L. (E.) 155**

AIRE AND CALDER NAVIGATION ACT, 1889—Wrecks, removal of—Right to recover expenses - - - - **615**
See SUMMARY JURISDICTION.

ANCHOR—Collision at—Duty of colliding vessel
See SHIP. 3. **351**

ANNUITIES—Liability to pay—Indian reserves
See PRIVY COUNCIL APPEALS. 3. **199**

ANTE-NUPTIAL SETTLEMENT — Mortgage bonds—Registration—Priority - **547**
See PRIVY COUNCIL APPEALS. 12.

ANTICIPATION—Restraint on—Married woman —Costs - - - - **177**
See HUSBAND AND WIFE.

APPEAL—Costs—Married woman—Restraint on anticipation - - - - **177**
See HUSBAND AND WIFE.

APPEAL—*continued.*

—— From licensing justices — Costs against objector - - - - **556**
See LICENSING ACTS.

—— Special leave given at the hearing—Practice - - - - - **268**
See PRIVY COUNCIL APPEALS. 17.

—— Special leave to appeal in criminal cases—Jurisdiction - - - - **719**
See PRIVY COUNCIL APPEALS. 16.

APPROPRIATION — *Of Payments — Debtor and Creditor — Right to Appropriate — Intention of Creditor.*

When a debtor pays money on account to his creditor and makes no appropriation to particular items, the creditor has the right of appropriation and may exercise the right up to the last moment, by action or otherwise; the application of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied, or presumed. The rule in *Clayton's Case*, (1816) 1 Mer. 585, does not apply to a case where there is no account current between the parties, nor where from an account rendered or other circumstances it appears that the creditor intended, not to make any appropriation, but to reserve the right.

The decision of the Court of Appeal reversed. CORY BROTHERS & CO. *v.* OWNERS OF TURKISH STEAMSHIP "MECCA." THE "MECCA" **H. L. (E.) 286**

ARREST — Arbitrary, illegal proclamation of—Legislative power - - - **238**
See PRIVY COUNCIL APPEALS. 10.

ASSIGNEE—Of inventor, petition by—Prolongation - - - - - **249**
See PATENT.

AVERAGE—Bond—Average statement—No duty to employ an average stater - **373**
See PRIVY COUNCIL APPEALS. 21.

BANK—Shares—Valuation of testator's estate—Probate duty - - - **214**
See PRIVY COUNCIL APPEALS. 22.

BARRISTER—Order striking off the roll reversed —Practice - - - - 218
See PRIVY COUNCIL APPEALS. 14.

BEACON—Buoy—Gas float—Salvage—Jurisdiction - - - - - 337
See SHIP. 7.

BILL OF EXCHANGE—*Cheque—Negotiable Instrument—"Issue"—"Fictitious or Non-Existing Person"—Belief or Intention of Drawer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 2, *s.* 7 *sub-s.* 3, *s.* 73.

A cheque drawn to the order of a fictitious or non-existing person may be treated as payable to bearer within the Bills of Exchange Act 1882 s. 7 sub-s. 3, although the drawer believes and intends the cheque to be payable to the order of a real person.

A clerk in the account department of the appellants, by fraudulently representing to them that work had been done on their account by B., induced them to draw cheques payable to the order of B. in payment for the pretended work. There was in fact no such person as B. The cheques when signed by the appellants were sent by them to the account department for postage. The clerk obtained possession of the cheques, indorsed them in B.'s name, and negotiated them with the respondents, who gave value for them in good faith. The cheques were paid to the respondents by the appellants' bankers. The appellants having discovered the fraud brought an action against the respondents to recover the amount of the cheques as money paid under a mistake of fact:—

Held, that the cheques were "issued" within the meaning of the Bills of Exchange Act 1882 s. 2; that B. was a "fictitious or non-existing person" within the meaning of s. 7 sub-s. 3 of the Act, although the appellants believed and intended the cheques to be payable to the order of a real person; that the cheques might therefore be treated as payable to bearer, and that the action could not be maintained, the respondents being holders in good faith for value.

The decisions of Wills J. and the Court of Appeal, [1895] 2 Q. B. 306, 707, affirmed CLUTTON *v.* ATTENBOROUGH & SON - H. L. (E.) 90

BREWER—Licence—Direct taxation - 231
See PRIVY COUNCIL APPEALS. 5.

BRITISH COLUMBIA—Consent judgment with intent to delay creditors - - 193
See PRIVY COUNCIL APPEALS. 2.

BRITISH HONDURAS—Laws of - - 367
See PRIVY COUNCIL APPEALS. 1.

BRITISH NORTH AMERICAN ACT 199, 231
See PRIVY COUNCIL APPEALS. 3, 5.

BUOY—Beacon—Gas float—Salvage—Jurisdiction - - - - - 337
See SHIP. 7.

CANADA—Laws of - 193, 199, 231, 254, 358, 499, 527
See PRIVY COUNCIL APPEALS. 2—8.

CAPE OF GOOD HOPE—Laws of - 238, 515
See PRIVY COUNCIL APPEALS. 9, 10.

CASES—*Acey* v. *Fernie*, (1840) 7 M. & W. 151, approved - - - - 499
See PRIVY COUNCIL APPEALS. 6.

—— *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575, followed - - - 231
See PRIVY COUNCIL APPEALS. 5.

—— *Bold Buccleugh* (*The*), (1851) 7 Moo. P. C. 267, approved - - - - 97
See SHIP. 6.

—— *Clayton's Case*, (1816) 1 Mer. 585, rule in, inapplicable - - - - 286
See APPROPRIATION.

—— *Crystal* (*The*), [1894] A. C. 508, referred to
See SUMMARY JURISDICTION. 615

—— *Dillet, In re*, (1887) 12 App. Cas. 459, reaffirmed - - - - 719
See PRIVY COUNCIL APPEALS. 16.

—— *Emmy Haase* (*The*), (1884) 9 P. D. 81, approved - - - - 391
See SHIP. 4.

—— *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376, approved - - - - 177
See HUSBAND AND WIFE.

—— *Leverington* (*The*), (1886) 11 P. D. 117, distinguished - - - - 532
See PRIVY COUNCIL APPEALS. 13.

—— *Reg.* v. *Glamorganshire* (*Justices of*), [1892] 1 Q. B. 621, overruled - - 556
See LICENSING ACTS.

—— *Shelley's Case*, (1581) 1 Rep. 93 b, rule in, applied - - - - 658
See WILL.

—— *Simonds* v. *White*, (1824) 2 B. & C. 805, explained - - - - 373
See PRIVY COUNCIL APPEALS. 21.

—— *Spargo's Case*, (1873) L. R. 8 Ch. 407, approved - - - - 358
See PRIVY COUNCIL APPEALS. 7.

CERTIFICATE—Shares fully paid up—Contributory—Estoppel - - - 156
See COMPANY. 5.

CEYLON—Laws of - - - 277, 547
See PRIVY COUNCIL APPEALS. 11, 12.

CHEQUE—Belief or intention of drawer—"Issued" - - - - 90
See BILL OF EXCHANGE.

CHINA—Crossing vessels in rivers—Regulations for preventing collisions - - 532
See PRIVY COUNCIL APPEALS. 13.

CLERGY—False declaration against simony—Immorality - - - - 226
See ECCLESIASTICAL LAW.

COLLISION—At anchor—Duty of colliding vessel—Onus probandi - - - 351
See SHIP. 3.

—— Compulsory pilotage—"Trading" - 333
See SHIP. 1.

—— Contract overriding limitation of liability 59
See SHIP. 2.

—— Loss of use of dredger—Remoteness of damage - - - - 596
See SHIP. 5.

—— Maritime lien for damage by—Mortgagee 97
See SHIP. 6.

COLLISION—*continued.*
—— Regulations for preventing—Crossing vessels in rivers - - - 532
See PRIVY COUNCIL APPEALS. 13.
—— Regulations for preventing—Reasonable delay - - - - 391
See SHIP. 4.

COLUMBIA—Consent judgment with intent to delay creditors - - - 193
See PRIVY COUNCIL APPEALS. 2.

COMPANY — *Debentures — Floating Security — Mortgage of Assets of a Company—Priority.*

A company issued debentures by which it undertook to pay the principal at a distant day and interest on fixed days half-yearly and charged by way of floating security all its property present and future. A condition indorsed on the debentures provided that "notwithstanding the said charge" the company might in the course and for the purpose of its business sell or otherwise deal with its property until default should be made in payment of interest for three months after the same should have become due, or until an order or resolution for winding up. After an instalment of interest had been due more than three months but before the debenture-holders had taken any step to enforce their security the company by an issue of bonds mortgaged specific assets:—

Held, upon the construction of the condition, that after the expiration of the three months the debentures remained a floating security till the holders took some step to enforce it and prevent the company from dealing with its property, and that the debenture-holders were not entitled to an injunction restraining the company from paying interest to the bondholders.

The decision of the Court of Appeal, [1895] 2 Ch. 551, affirmed. GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT COMPANY *v.* MANILA RAILWAY COMPANY - H. L. (E.) 81

2. —— *Debentures—One Man Company—Private Company—Limited Liability—Winding-up—Fraud upon Creditors — Liability to indemnify Company in respect of Debts—Rescission—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 8, 30, 43.

It is not contrary to the true intent and meaning of the Companies Act, 1862, for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited company consisting only of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with.

A trader sold a solvent business to a limited company with a nominal capital of 40,000 shares of 1*l.* each, the company consisting only of the vendor, his wife, a daughter, and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders. In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor

COMPANY—*continued.*

the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the requirements of the Companies Act, 1862, were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors:—

Held, that the proceedings were not contrary to the true intent and meaning of the Companies Act, 1862; that the company was duly formed and registered and was not the mere "alias" or agent of or trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that there was no fraud upon creditors or shareholders; and that the company (or the liquidator suing in the name of the company) was not entitled to rescission of the contract for purchase.

The decisions of Vaughan Williams J. and the Court of Appeal, [1895] 2 Ch. 323, reversed. SALOMON *v.* SALOMON & CO. SALOMON & CO. *v.* SALOMON - - - - H. L. (E.) 22

3. —— *Debentures — Trustees for Debenture-holders—Receiver — Principal and Agent—Liability for Goods ordered by Receiver.*

A limited company mortgaged all its assets to trustees for debenture-holders to secure payment of the debentures, and by the deed it was provided that the trustees might in writing appoint a receiver who should carry on the business of the company, and that any receiver so appointed should be the agent of the company who alone should be liable for his acts and defaults. The trustees appointed a receiver under the deed and he took possession of the assets and carried on the business of the company. Soon after his appointment the company was ordered to be compulsorily wound up. The receiver continued to carry on the business and in so doing ordered goods from the respondents. In an action against the trustees for the price of the goods:—

Held, reversing the decision of the Court of Appeal, [1896] 1 Q. B. 669, that though after the winding-up order the receiver ceased to be the agent of the company, he did not thereby or at any time receive any implied authority from the trustees to act as their agent, and that as the trustees never gave him any authority in fact they were not liable for the goods. GOSLING *v.* GASKELL AND GROCOTT - H. L. (E.) 575

4. —— *Winding-up—Contributories—Adjustment of Rights of—Shares issued at a Discount—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

It being ultra vires for a limited company to issue shares at a discount or by way of bonus, although authorized to do so by the articles of association, the holders of shares so issued are not thereby relieved from liability, in a winding-up, to calls for the amounts unpaid on their shares for the adjustment of the rights of contributories inter se, as well as for the payment of the company's debts and the costs of winding up.

The decision of the Court of Appeal, [1895] 1 Ch. 255, affirmed, Lord Herschell dissenting. WELTON *v.* SAFFERY - - H. L. (E.) 299

COMPANY—*continued.*

5. —— *Winding-up—Contributory—Allottee—Certificate that Shares are fully paid up—Estoppel.* The appellant lent money to a limited company upon the terms that he should have as collateral security fully paid shares in the company, and the company handed to the appellant certificates for 10,000 shares of 1*l.* each. The certificates stated that he was the registered holder of the shares, and that on each of them the full amount had been paid. No money had in fact been paid upon the shares, which were issued from the company direct to the appellant, but he did not know this and believed the representation that they were fully paid shares. An order having been made to wind up the company, the appellant was placed on the list of contributories:—

Held, that since the company had obtained the loan by a representation that the shares were fully paid, which the appellant believed and acted upon, the company and the liquidator were estopped from alleging that the shares were not fully paid, and that the appellant was entitled to have his name removed from the list of contributories.

The decision of the Court of Appeal, [1896] 2 Ch. 525, reversed. BLOOMENTHAL *v.* FORD (LIQUIDATOR OF VEUVE MONNIER ET SES FILS, LD.) H. L. (E.) 156

—— Adjournment of a meeting—Power of chairman to refuse - - - 268
See PRIVY COUNCIL APPEALS. 17.

—— Shares—Price of property sold to company
See PRIVY COUNCIL APPEALS. 7. 358

COMPULSORY PILOTAGE — Collision — "Trading" - - - - - 333
See SHIP. 1.

CONSENT—Judgment with intent to delay creditors - - - - 193
See PRIVY COUNCIL APPEALS. 2.

CONTRACT—Overriding limitation of liability—Collision—Damages - - 59
See SHIP. 2.

CONTRIBUTORY—Adjustment of rights—Shares issued at a discount - - 299
See COMPANY. 4.

—— Certificate that shares are fully paid up—Estoppel - - - - 156
See COMPANY. 5.

COSTS—Appeal from licensing justices—Costs against objector - - - 556
See LICENSING ACTS.

—— Appeal — Married woman — Restraint on anticipation - - - 177
See HUSBAND AND WIFE.

—— Repayment of—Solicitor—Reversal of judgment - - - - 172
See PRACTICE. 1.

COUNTY COUNCIL (LONDON)—Public park—Rateable value—Beneficial occupation
See POOR-RATE. 625

COUNTY COURT — Jurisdiction — Salvage—Gas float - - - - - 337
See SHIP. 7.

COUNTY COURT—*continued.*

—— Pollution of rivers—Right of complainant to interrogate—Discovery - - 550
See PRACTICE. 2.

COVENANT — Lease — Diversion of spring — "Stream" - - - - 129
See WATER.

CREDITOR—Consent judgment with intent to delay - - - - 193
See PRIVY COUNCIL APPEALS. 2.

—— Debtor and—Payments—Right to appropriate - - - - 286
See APPROPRIATION.

CRIMINAL LAW—Special leave to appeal in criminal cases—Jurisdiction - 719
See PRIVY COUNCIL APPEALS. 16.

CROSSING VESSELS IN RIVERS—Regulations for preventing collisions - - 532
See PRIVY COUNCIL APPEALS. 13.

CRUELTY — Judicial separation — "Legal cruelty" - - - - 395
See DIVORCE. 2.

DAMAGE—Collision—Contract overriding limitation of liability - - - 59
See SHIP. 2.

—— Remoteness of—Collision—Loss of use of dredger - - - - 596
See SHIP. 5.

DEBENTURE - - - - 22, 81, 575
See COMPANY. 1—3.

DEBTOR—Creditor and—Payments — Right to appropriate - - - - 286
See APPROPRIATION.

DEDUCTION—Profits or gains—Income tax 1
See REVENUE. 1.

DEFAMATION—Excess of privilege—Malice 68
See LIBEL.

DELAY—Reasonable—Regulations for preventing collisions at sea - - 391
See SHIP. 4.

DESCENT—Purchase—Rule in *Shelley's Case* 658
See WILL.

DISCOUNT—Shares issued at a—Adjustment of rights of contributories - - 299
See COMPANY. 4.

DISCOVERY—Pollution of rivers—Right of complainant to interrogate - - 550
See PRACTICE. 2.

DIVORCE—*Divorce Bill — Definitive Decree of Divorce — Action for Criminal Conversation — Standing Orders, Nos.* 175, 177—*Domiciled Irishman—Jurisdiction of the English Court—Evidence taken in India.*

Great caution ought to be observed in allowing a petition for divorce to proceed in the English Divorce Court where there is ground for supposing that the parties are domiciled out of the jurisdiction.

It is not necessary for the first reading of an Irish divorce bill that a definitive sentence of divorce à mensâ et thoro should have been pronounced in the Irish Courts.

Where in the proceedings upon an Irish

DIVORCE—*continued.*
divorce bill it appears that no action for criminal conversation has been brought against a co-respondent who was not domiciled and could not be served in Ireland, the House of Lords may allow the bill for divorce to be received.

Where there is no means of enforcing the warrant of the House of Lords to take evidence in parts of India, the evidence as taken and used in a previous suit in the English Court of Divorce may be allowed to be used quantum valeat. SINCLAIR'S DIVORCE BILL - **H. L. (D.) 469**

2. —— *Judicial Separation—Cruelty—"Legal Cruelty"—Matrimonial Causes Acts*, 1857 (20 & 21 *Vict. c.* 85, *s.* 22) *and* 1884 (47 & 48 *Vict. c.* 68).

A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation:—

So *held*, by the majority of the House of Lords (Lords Herschell, Watson, Macnaghten, Shand, and Davey: Lord Halsbury L.C., Lords Hobhouse, Ashbourne, and Morris dissenting).

The effect of the Matrimonial Causes Act, 1884, debated, but not decided. EARL RUSSELL *v.* COUNTESS RUSSELL - - **H. L. (D.) 395**

DOMICIL—Divorce bill—Domiciled Irishman—Jurisdiction of the English Court **469**
See DIVORCE. 1.

DREDGER—Loss of use of—Collision—Remoteness of damage - - - **596**
See SHIP. 5.

DUTY—Policy of insurance—Succession duty
See REVENUE DUTY. 3. **145**

—— Probate—Valuation of testator's estate **214**
See PRIVY COUNCIL APPEALS. 22.

—— Probate duty—Foreign mortgage - **11**
See REVENUE. 2.

EASEMENT—*Opening Locks on River—Dominant and Servient Tenement—Prescription—Presumption of Legal Origin—Lost Grant—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

An easement, exercised for the benefit of the dominant estate, is not invalid merely because from the very nature of the right its exercise by the dominant estate confers some benefit upon other tenements.

The corporation of Godmanchester as owners of certain lands had for more than 200 years opened as of right the gates of certain sluices or locks belonging to the appellant upon the River Ouse in time of flood or likelihood of flood in order to prevent damage to those lands:—

Held, that the easement was good and was none the worse because the exercise of it also benefited lands belonging to other persons; and that the corporation could maintain their right either by s. 2 of the Prescription Act, 1832, or by the fiction of a lost grant.

The decision of the Court of Appeal, [1896] 1 Ch. 214, affirmed. SIMPSON *v.* GODMANCHESTER CORPORATION - - - **H. L. (E.) 696**

ECCLESIASTICAL LAW—*Simony—Immorality—Clerical Subscription Act*, 1865—*False Declaration against Simony—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12.

Held, that in order to punish the offence of simony in a clerk resort cannot be had to the provisions of the Clergy Discipline Act of 1892, but proceedings must still be taken under the Act of 1840. The immorality against which the Act of 1892 is directed is so defined by ss. 2 and 12 as to exclude simony from its scope:

Held, also, that a false declaration against simony under the Clerical Subscription Act of 1865 cannot be isolated from the charge of simony and brought within the scope of the Act of 1892. BENEFICED CLERK *v.* LEE - - **P. C. 226**

EJECTMENT — Setting aside verdict — Withdrawal of facts from jury - - **509**
See PRIVY COUNCIL APPEALS. 15.

ELECTRIC LIGHT—Power to lay wires underground—Right to excavate streets **527**
See PRIVY COUNCIL APPEALS. 8.

ESTATE TAIL—Issue—Heirs—Gift over—Rule in *Shelley's Case* - - - **658**
See WILL.

ESTOPPEL—Certificate shares fully paid up—Contributory - - - **156**
See COMPANY. 5.

EVIDENCE—Evidence taken in India—Previous suit in English Court of Divorce—Practice - - - - **469**
See DIVORCE. 1.

—— Parol—Admissibility—Written agreement
See PRIVY COUNCIL APPEALS. 19. **540**

EXTRAORDINARY TRAFFIC — "Person by whose order such weight or traffic has been conducted" - - - **633**
See HIGHWAY.

FIDEI COMMISSUM—Will—Jus accrescendi
See PRIVY COUNCIL APPEALS. 11. **277**

FOREIGN JURISDICTION — Special leave to appeal in criminal cases - - **719**
See PRIVY COUNCIL APPEALS. 16.

FOREIGN MORTGAGE — Probate duty — Local situation of asset - - - **11**
See REVENUE. 2.

FRAUD—Imitation of rival traders' goods—Injunction - - - - **710**
See TRADE NAME.

—— One-man company—Debts of founder **22**
See COMPANY. 2.

FREIGHT—Loss of—Time policy of insurance—Exception - - - - **609**
See INSURANCE, MARINE.

GAS—Power to lay wires underground—Right to excavate streets - - - **527**
See PRIVY COUNCIL APPEALS. 8.

GAS FLOAT — Salvage — Jurisdiction — County court - - - - **337**
See SHIP. 7.

GOLD COAST COLONY—Laws of - - **218**
See PRIVY COUNCIL APPEALS. 14.

GRANT—Lost—Opening locks on river—Prescription - - - - 696
See EASEMENT.

GUARDIANS OF THE POOR—Loan—Redemption without consent of lender - 647
See POOR LAW.

HARBOUR — Wrecks, removal of — Right to recover expenses in Court of Summary Jurisdiction - - - 615
See SUMMARY JURISDICTION.

HIGHWAY—*Excessive Weight or Extraordinary Traffic*—"*Person by whose Order such Weight or Traffic has been conducted*"—*Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 23.

The respondent contracted with several persons for the delivery to him of materials required for his residence, the prices including carriage to be payable and the property in the materials to pass on delivery and acceptance at his residence. The materials were conveyed by a certain highway. The respondent knew that the contractors intended to send the materials by that highway by traction engines and trucks, but he did not employ or pay the carriers or give directions as to the route or the mode of conveyance. Extraordinary expenses having been incurred by the highway authority by reason of the damage caused by excessive weight passing along the highway or extraordinary traffic thereon, within s. 23 of the Highways and Locomotives (Amendment) Act 1878:—

Held, that the respondent was not a "person by whose order such weight or traffic had been conducted" within the meaning of that section, and that he was not liable for the expenses.

The decision of the Court of Appeal, [1897] 1 Q. B. 351, affirmed. KENT COUNTY COUNCIL *v.* LORD GERARD - - - H. L. (E.) 633

HOTEL—Exclusion from railway station of servant wearing hotel badge—Trespass 479
See RAILWAY.

HUSBAND AND WIFE — *Separate Estate* — *Restraint on Anticipation—Appeal by Married Woman Defendant* — *Costs*—"*Proceeding Instituted*"—*Married Women's Property Act* 1893 (56 & 57 *Vict. c.* 63) *s.* 2.

An appeal by a woman from a judgment in an action in which she is defendant is not a "proceeding instituted" within the meaning of the Married Women's Property Act 1893 c. 63 s. 2, and an order cannot be made under that section for the payment of the costs of the opposite party out of her separate property which is subject to a restraint upon anticipation. The section applies only to an action or other litigation initiated by a woman.

Hood Barrs v. *Cathcart*, [1894] 3 Ch. 376, approved. HOOD BARRS *v.* HERIOT H. L. (E.) 177

—— Divorce - - - - 395, 469
See DIVORCE. 1, 2.

IMMORALITY—False declaration against simony—Clerical Subscription Act, 1865 226
See ECCLESIASTICAL LAW.

INCOME TAX—Deduction—"Sum employed as capital" - - - - 1
See REVENUE. 1.

INDEMNITY—Fraud upon creditors—Debts of founder - - - - 22
See COMPANY. 2.

INDIAN RESERVES—Liability to pay annuities in respect thereof - - - 199
See PRIVY COUNCIL APPEALS. 3.

INJUNCTION—Imitation of rival traders' goods 710
See TRADE NAME.

—— Right to uninterrupted current of air—Stagnation of air—Nuisance - 155
See AIR.

INSURANCE, LIFE—Policy—Payment of premium by notes discounted and then dishonoured - - - - 499
See PRIVY COUNCIL APPEALS. 6.

—— Succession duty - - - 145
See REVENUE. 3.

INSURANCE, MARINE—*Loss of Freight*—*Time Policy*—*Exception*—"*Claim consequent on Loss of Time*"—*Loss of Time arising from Peril of the Sea.*

A time policy of insurance on freight was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." During a voyage the steamer's main shaft broke through a peril of the sea and the vessel returned to her port of loading. It was there found that the necessary delay for repairs would frustrate the objects of the adventure, and the charterers, as they were entitled to do by the foreign law applicable, put an end to the charter and the freight was lost. In an action on the policy for total loss of freight:—

Held, that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

The decision of the Court of Appeal, [1897] 1 Q. B. 29, affirmed. BENSAUDE *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY H. L. (E.) 609

INTERDICT — Snow — Street — Obstruction — Tramways - - - - 111
See NUISANCE.

INTERROGATORIES—Pollution of rivers—Right of complainant to interrogate - 550
See PRACTICE. 2.

ISSUE—Estate tail—Heirs—Gift over—Rule in *Shelley's Case* - - - 658
See WILL.

JAMAICA—Laws of - - - - 509
See PRIVY COUNCIL APPEALS. 15.

JAPAN—Crossing vessels in rivers—Regulations for preventing collisions - - 532
See PRIVY COUNCIL APPEALS. 13.

—— Special leave to appeal in criminal cases—Jurisdiction - - - - 719
See PRIVY COUNCIL APPEALS. 16.

JUDGMENT—Reversal of—Repayment of costs—Solicitor - - - - 172
See PRACTICE. 1.

JUDICIAL SEPARATION — Cruelty — "Legal cruelty" - - - - 395
See DIVORCE. 2.

JURISDICTION—English Court—Divorce bill—Domiciled Irishman - - 469
See DIVORCE. 1.

—— Foreign—Special leave to appeal in criminal cases - - - - - 719
See PRIVY COUNCIL APPEALS. 16.

—— Salvage—Gas float—County court - 337
See SHIP. 7.

—— Setting aside verdict - - - 520
See PRIVY COUNCIL APPEALS. 18.

—— Summary—Appeal from licensing justices
See LICENSING ACTS. 556

—— Summary—Right to recover expenses—Removal of wrecks - - - 615
See SUMMARY JURISDICTION.

JURY—Withdrawal of facts from—Misdirection
See PRIVY COUNCIL APPEALS. 15. 509

JUS ACCRESCENDI—Will—Construction—Fidei commissum - - - - 277
See PRIVY COUNCIL APPEALS. 11.

JUSTICES—Appeal from licensing—Costs against objector - - - - 556
See LICENSING ACTS.

LAND—Ceylon Land Registration Act—Priority
See PRIVY COUNCIL APPEALS. 12. 547

LANDS TITLES REGISTRY ACT—Registered title — Adverse possession — British Honduras - - - - 367
See PRIVY COUNCIL APPEALS. 1.

LEASE — Covenant — Diversion of spring — "Stream" - - - - 129
See WATER.

LIABILITY—Contract overriding limitation of—Collision—Damages - - 59
See SHIP. 2.

LIBEL—*Defamation—Privileged Occasion—Excess of Privilege—Malice.*

The appellant acted for some time as agent to an insurance company at his own offices. After some correspondence as to a change of terms upon which the parties could not agree, the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his offices had "been closed by the directors." The appellant having brought an action for libel against the company the judge ruled that the statement was capable of a defamatory meaning but that the occasion was privileged. The jury found a verdict for the plaintiff, that the statement was a libel, that it was untrue, and that the defendants had exceeded the privilege, but did not find actual malice:—

Held, that the judgment must be for the company, on the grounds that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, and that there was no evidence of malice for the jury.

The decision of the Court of Appeal, [1895] 2 Q. B. 156, affirmed. NEVILL *v.* FINE ART AND GENERAL INSURANCE COMPANY - H. L. (E.) 68

LICENCE—Brewer—Direct taxation - 231
See PRIVY COUNCIL APPEALS. 5.

LICENSING ACTS—*Appeal from Licensing Justices—Objection to Licence—Party to Appeal—Order for Costs against Objector—Court of Summary Jurisdiction—Summary Jurisdiction Act* 1879 (42 & 43 *Vict. c.* 49) *s.* 31—*Interpretation Act* 1889 (52 & 53 *Vict. c.* 63) *s.* 13 *sub-s.* 11.

Justices at a licensing meeting are not a court of summary jurisdiction; a refusal of licensing justices to renew a licence is not "a conviction or order"; and appeals to quarter sessions against the refusal to grant a licence are not regulated by s. 31 of the Summary Jurisdiction Act, 1879.

At a licensing meeting a person objected to the renewal of a licence, and it was refused. On appeal to quarter sessions the objector did not appear, and the renewal was granted:—

Held, that the Court of Quarter Sessions had no power to make an order for costs against the objector.

The decision of the Court of Appeal, [1896] 2 Q. B. 306, reversed.

Reg. v. *Justices of Glamorganshire*, [1892] 1 Q. B. 621, overruled. BOULTER *v.* JUSTICES OF KENT - - - - - H. L. (E.) 556

LIEN—Maritime, for damage by collision—Mortgagee - - - - 97
See SHIP. 6.

LIFE INSURANCE—Policy—Succession duty 145
See REVENUE.

—— Premium—Duties of insurers' agent - 499
See PRIVY COUNCIL APPEALS. 6.

LIMITATIONS, STATUTE OF—Registered title—Adverse possession - - 367
See PRIVY COUNCIL APPEALS. 1.

LOAN—Redemption without consent of lender—Guardians of the poor - - 647
See POOR LAW.

LOCKS—Opening, on river—Prescription—Lost grant - - - - 696
See EASEMENT.

LOCOMOTIVE—Excessive weight or extraordinary traffic - - - - 633
See HIGHWAY.

LONDON—Public park—Rateable value—London County Council - - - 625
See POOR-RATE.

MALICE—Defamation—Excess of privilege 68
See LIBEL.

MALICIOUS PROSECUTION—Mens rea—Statutory offence - - - - 383
See PRIVY COUNCIL APPEALS. 20.

MANITOBA—Laws of - - - 254
See PRIVY COUNCIL APPEALS. 4.

MARINE INSURANCE—Loss of freight—Exception - - - - 609
See INSURANCE, MARINE.

MARITIME LIEN—Damage by collision—Mortgagee - - - - 97
See SHIP. 6.

MARRIED WOMAN—Costs—Appeal—Restraint on anticipation - - - 177
See HUSBAND AND WIFE.

MATRIMONIAL CAUSES ACTS — Cruelty — "Legal cruelty"—Judicial separation
See DIVORCE. 2. 395

MEETING—Power of chairman to refuse adjournment - - - - - 268
See PRIVY COUNCIL APPEALS. 17.

MENS REA—Malicious prosecution—Statutory offence - - - - 383
See PRIVY COUNCIL APPEALS. 20.

MERCHANT SHIPPING ACT REGULATIONS, Art. 18 - - - - 391
See SHIP. 4.

MERCHANT SHIPPING ACTS.
See Cases under SHIP.

MERSEY HARBOUR TRUSTEES—Loss of use of dredger—Collision—Damages - 596
See SHIP. 5.

MINE—Water required for mining purposes—Monopoly of supply - - 515
See PRIVY COUNCIL APPEALS. 9.

MISDIRECTION—Withdrawal of facts from jury—Setting aside verdict - - 509
See PRIVY COUNCIL APPEALS. 15.

MORTGAGE—*Power of Sale—Sale to one of several Mortgagors—Tenants in Common—Purchase by One Co-Tenant—Mortgagee, Duties of.*

The only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in his mortgage is that he should act in good faith. In determining whether the mortgagee's conduct in that respect comes up to the required standard regard must be had to the circumstances of the particular case.

Mortgagees under a mortgage by two tenants in common, one of whom became bankrupt, sold by private contract to the other for a sum equal to the exact amount due in respect of the mortgage for principal, interest and costs, the bulk of the purchase-money being left on the security of the property:—

Held, under the circumstances that the transaction was a proper exercise of the power of sale, and that the sale was valid for all purposes, giving rise to no claim on the part of the bankrupt's estate either against the mortgagees or against the purchaser.

There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

Decision of the Court of Appeal, [1896] 1 Ch. 762, affirmed. KENNEDY *v.* DE TRAFFORD **H. L. (E.) 180**

—— Assets of company—Debentures—Priority
See COMPANY. 1. 81

—— Construction—Section of railway capable of sale - - - - - 254
See PRIVY COUNCIL APPEALS. 4.

MORTGAGE—*continued.*

—— Maritime lien for damage by collision 97
See SHIP. 6.

—— Probate duty—Foreign mortgage - 11
See REVENUE. 2.

—— Registration—Priority—Unregistered antenuptial settlement - - 547
See PRIVY COUNCIL APPEALS. 12.

NATAL—Laws of - - - 268, 520
See PRIVY COUNCIL APPEALS. 17, 18.

NEGOTIABLE INSTRUMENT—Cheque—Belief or intention of drawer - - 90
See BILL OF EXCHANGE.

NEW SOUTH WALES—Laws of 373, 383, 540
See PRIVY COUNCIL APPEALS. 19—21.

NUISANCE—*Obstruction of Street—Tramways—Snow and Salt—Interdict.*

A tramway company after a heavy fall of snow cleared their track by means of a snow-plough and heaped up the snow upon the sides of the streets: they then scattered salt upon the rails and in the vicinity; the town council did not take any immediate steps to remove the briny slush so produced, and it was left upon the streets:—

Held, reversing the decision of the Second Division, that a legal nuisance had been committed which was not sanctioned by either the special or the general Tramways Acts, and that the default, if any, of the town council did not affect the primary liability of the tramway company. OGSTON *v.* ABERDEEN DISTRICT TRAMWAYS COMPANY - - - **H. L. (Sc.) 111**

—— Right to uninterrupted current of air—Stagnation of air - - - 155
See AIR.

ONTARIO—Laws of - - - 231, 499
See PRIVY COUNCIL APPEALS. 5, 6.

ONUS PROBANDI—Cash payment of premium
See PRIVY COUNCIL APPEALS. 6. 499

—— Collision at anchor — Duty of colliding vessel - - - - 351
See SHIP. 3.

PARK—Rateable value—Beneficial occupation—London County Council - - 625
See POOR-RATE.

PAROL EVIDENCE — Admissibility — Written agreement - - - - 540
See PRIVY COUNCIL APPEALS. 19.

PATENT—*Prolongation—Petition by Assignee of Inventor.*

Although the effect of the Act of 1883 (46 & 47 Vict. c. 57) is to confirm an assignee's right to petition for prolongation of his patent, he cannot succeed without shewing that the original inventor has been inadequately remunerated. *In re* HOPKINSON'S PATENT **P. C. 249**

PAYMENT—Right to appropriate—Intention of creditor - - - - 286
See APPROPRIATION.

PAYMENT—*continued.*

—— Shares—Price of property sold to company *See* PRIVY COUNCIL APPEALS. 7. 358

POLICY—Duties of insurers' agent—Payment of premium by notes discounted and then dishonoured - - - 499
See PRIVY COUNCIL APPEALS. 6.

—— Life insurance—Succession duty - 145
See REVENUE. 3.

—— Time policy of insurance—Exception—Loss of freight - - - - 609
See INSURANCE, MARINE.

POLLUTION OF RIVERS—Right of complainant to interrogate—Discovery - 550
See PRACTICE. 2.

PONDOLAND—Cape of Good Hope—Laws of
See PRIVY COUNCIL APPEALS. 10. 238

POOR LAW—*Guardians of the Poor—Loan for Term of Years—Redemption without Consent of Lender—Poor Law Loans Act* 1871 (34 & 35 *Vict. c.* 11) *s.* 2.

Guardians of the poor who have since April 24, 1871 (the date of the passing of the Poor Law Loans Act 1871) borrowed moneys, to be repaid at stipulated times, cannot even with the authority of an order of the Local Government Board under s. 2 of the Act, compel the lender to accept against his will repayment otherwise than in accordance with the contract.

The decision of the Court of Appeal, [1897] 1 Ch. 335, affirmed. WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY
H. L. (E.) 647

POOR-RATE—*Public Park—Rateable Value—Beneficial Occupation—London County Council—London Council (General Powers) Act* 1890 (53 & 54 *Vict. c. ccxliii.*) *ss.* 4, 5.

A county council, not charged with the duty of providing a park, were empowered by statute to purchase and accordingly purchased premises which by the statute were to be maintained by the county council as a park for the perpetual use thereof by the public for exercise and recreation. The necessary expenses of maintaining the park exceeded any sums which the council could derive from licences for the supply of refreshments therein or for grazing rights or otherwise:—

Held, that the county council were not rateable to the poor-rate in respect of the park, both because the park thus dedicated by statute to the use of the public had no rateable value, and also because the county council were not occupiers of the park for rating purposes.

The decision of the Court of Appeal, [1896] 2 Q. B. 25, affirmed. LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL - H. L. (E.) 625

POWER OF SALE—Purchase by one co-tenant—Mortgagee, duties of - - 180
See MORTGAGE.

PRACTICE—*Costs—Solicitor—Reversal of Judgment—Repayment of Costs.*

A solicitor who has demanded and received payment of costs payable to his client under an order of Court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him where there has been no misconduct and no undertaking to repay.

The decision of the Court of Appeal, [1896] 1 Q. B. 610, affirmed. HOOD BARRS *v.* CROSSMAN & PRICHARD - - - H. L. (E.) 172

2. —— *Discovery—Pollution of Rivers—Proceedings in County Court whether Civil or Criminal—Right of Complainant to Interrogate—Rivers Pollution Prevention Act* 1876 (39 & 40 *Vict. c.* 75) *ss.* 3, 10.

Where a statute creates an offence and empowers a county court to make an order requiring any person to abstain from committing the offence, and also to impose a penalty upon any person disobeying the order, the county court may in proceedings taken to obtain an order grant discovery against the defendant, since discovery in proceedings to obtain an order could not expose the defendant to a penalty.

So *held* with regard to ss. 3, 10 of the Rivers Pollution Prevention Act 1876.

The decision of the Court of Appeal, [1896] 2 Q. B. 297, affirmed. DERBY CORPORATION *v.* DERBYSHIRE COUNTY COUNCIL - H. L. (E.) 550

—— Appeal—Special leave given at the hearing *See* PRIVY COUNCIL APPEALS. 17. 268

—— Appeal—Special leave to, in criminal cases—Jurisdiction - - - 719
See PRIVY COUNCIL APPEALS. 16.

—— Barrister and solicitor—Order striking off the Roll reversed - - - 218
See PRIVY COUNCIL APPEALS. 14.

—— Issues not raised in courts below - 254
See PRIVY COUNCIL APPEALS. 4.

—— Setting aside verdict—Jurisdiction of Court as to - - - - - 520
See PRIVY COUNCIL APPEALS. 18.

—— Setting aside verdict—Withdrawal of facts from jury - - - - 509
See PRIVY COUNCIL APPEALS. 15.

PREMIUM—Policy—Duties of insurers' agent
See PRIVY COUNCIL APPEALS. 6. 499

PRESCRIPTION—Opening locks on river—Lost grant - - - - 696
See EASEMENT.

PRESUMPTION—Of legal origin—Opening locks on river—Prescription - - 696
See EASEMENT.

PRINCIPAL AND AGENT—Receiver—Liability for goods ordered by—Trustees for debenture-holders - - - 575
See COMPANY. 3.

PRIORITY—Ceylon Land Registration Ordinance - - - - 547
See PRIVY COUNCIL APPEALS. 12.

—— Floating security—Mortgage of assets of company - - - - 81
See COMPANY. 1.

PRIVILEGE—Excess of—Malice - - 68
See LIBEL.

PRIVY COUNCIL APPEALS—BRITISH HONDURAS—*Limitation, Statute of—Registered Title—Adverse Possession—Lands Titles Registry Act*

PRIVY COUNCIL APPEALS—BRITISH HONDURAS—*continued.*

—*Consolidated Laws of* 1887, *c.* 106, *s.* 30; *c.* 19, *s.* 5.

Held, with regard to the British Honduras Consolidated Laws of 1887, that the provisions of the Limitation Act (c. 19) apply to lands held under a title registered under the Lands Titles Registry Act (c. 106); and that consequently twenty years' adverse possession extinguishes by force of s. 5 of the former Act a title registered under the latter Act. BELIZE ESTATE AND PRODUCE COMPANY *v.* QUILTER - - P. C. 367

2. —— CANADA—*British Columbia — Consent Judgment with intent to delay Creditors—Consolidated Statutes, c.* 51, *s.* 1.

Under s. 1 of c. 51 of the Consolidated Statutes of British Columbia a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was *held* to be null and void against them. So long as the intent is proved, it is immaterial whether consent was given under pressure. EDISON GENERAL ELECTRIC COMPANY *v.* WESTMINSTER AND VANCOUVER TRAMWAY COMPANY P. C. 193

3. —— *British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 109, 111, 112—*Indian Reserves—Liability to pay Annuities in respect thereof.*

By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—

Held that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under s. 109 in that province.

The perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:—

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111, 112; in the same manner as the original annuities. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *v.* ATTORNEY-GENERAL FOR ONTARIO. ATTORNEY-GENERAL FOR QUEBEC *v.* ATTORNEY-GENERAL FOR ONTARIO - - - P. C. 199

4. —— *Manitoba—Dominion Railway—Section capable of Sale—Jurisdiction of Provincial Court—Part of Section outside Jurisdiction of Court — Construction of Mortgage — Revenues — Practice—Issues not raised in Courts below.*

In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues subject to working expenses, for a sale of the division and for a receiver and other relief:—

Held, (1.) that this division of 180 miles is by

PRIVY COUNCIL APPEALS—CANADA—*contd.*

the law of Canada applicable to the railway a section capable of sale in its entirety, but that the provincial Court had no power to order a sale, part of the section being within and part without its jurisdiction; (2.) that so long as the railway was worked as a whole the revenues of the division are subject along with other revenues to the working expenses of the whole line, and that the receiver was only entitled to the net earnings of the division so ascertained.

Their Lordships declined to hear argument as to the validity of the mortgage or of the power of sale, or of the mortgagees' right of entry, the pleadings and evidence not raising those issues, and the Courts below not having adjudicated thereon. GREY *v.* MANITOBA AND NORTH WESTERN RAILWAY COMPANY OF CANADA P. C. 254

5. —— *Ontario—Brewers' Licences—Revised Statutes of Ontario, c.* 194, *s.* 51, *sub-s.* 2—*Direct Taxation — British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *sub-ss.* 2, 9—*Powers of Provincial Legislature.*

Held, that the Liquor Licence Act (Revised Statutes of Ontario, c. 194), s. 51, sub-s. 2, which requires every brewer and distiller to obtain a licence thereunder to sell wholesale within the province, is intra vires of the provincial legislature—

(*a*) as being direct taxation within sub-s. 2, s. 92, of the British North America Act, 1867.

Bank of Toronto v. *Lambe*, (1887) 12 App. Cas. 575, followed.

(*b*) as comprised within the term "other licences" in sub-s. 9 of the same section. BREWERS AND MALTSTERS' ASSOCIATION OF ONTARIO *v.* ATTORNEY-GENERAL FOR ONTARIO P. C. 231

6. —— *Ontario—Insurance, Life—Policies of Life Assurance—Proviso for Cash Payment of Premium—Onus probandi—Duties of Insurers' Agent—Payment of Premium by Notes Discounted and then Dishonoured.*

Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the onus is on the policy-holder to prove cash payment of the premium.

Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds.

And where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder.

Acey v. *Fernie*, (1840) 7 M. & W. 151, approved. LONDON AND LANCASHIRE LIFE ASSURANCE COMPANY *v.* FLEMING - - P. C. 499

7. —— *Quebec — Company — Shares — Pay-*

PRIVY COUNCIL APPEALS—CANADA—*contd.*

ment in Cash—Price of Property sold to Company —Quebec Revised Statutes, Art. 4722 (1), (5).

The shares of promoters of a company incorporated under the Revised Statutes of Quebec having been credited as paid in full under an arrangement by which half the amount thereof was paid in cash and half by receipts on account of the purchase price of the property acquired by the company:—

Held, that under art. 4722, par. 1 (originally enacted as s. 1 of Quebec Statute 47 Vict. c. 73, and reproducing s. 25 of the English Companies Act, 1867), the shares were rightly so credited; the promoters having acted in good faith and the purchase price being fair.

Spargo's Case, (1873) L. R. 8 Ch. 407, approved. LAROCQUE *v.* BEAUCHEMIN P. C. 358

8. —— *Quebec—Underground Wires—Power to Lay Wires Underground for Purpose of supplying Electricity and Gas—Right to Excavate Streets—Quebec Act* (55 & 56 *Vict. c.* 77), *s.* 5—*Construction.*

Sect. 5 of the respondent company's incorporating Act (55 & 56 Vict. c. 77) empowers it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes, and public places as may be deemed necessary for the purpose of supplying electricity and gas:—

Held, that the power to open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted. CITY OF MONTREAL *v.* STANDARD LIGHT AND POWER COMPANY P. C. 527

9. —— **CAPE OF GOOD HOPE**—*Agreement—Construction — Proviso — Monopoly of Supply — Water required for Mining Purposes.*

Where respondents had agreed for a specified term to "obtain and purchase all the water required by them for their mining purposes" from the appellants and from no other person or persons, with a proviso excepting any water obtained by them from their own mines:—

Held, that on the true construction of this agreement the proviso was not limited to such mines as the respondents possessed at the date of the agreement; and that on the other hand they could not deprive the appellants of their monopoly of supply by obtaining it gratis elsewhere. KIMBERLEY WATERWORKS COMPANY *v.* DE BEERS CONSOLIDATED MINES - - P. C. 515

10. —— *Pondoland Annexation Act*, 1894, *No.* 5, *s.* 2—*Construction—Extent of Legislative Power conferred on the Governor—Illegal Proclamation of arbitrary Arrest, Conviction, and Punishment.*

Sect. 2 of the Pondoland Annexation Act, 1894, gives authority to the Governor to add to the existing laws, already proclaimed and in force in the territories annexed, such laws as he "shall from time to time by proclamation declare to be in force in such territories":—

Held, that this section did not, according to its true construction, authorize the Governor to make new laws, but only to transplant to the new territories and enact there such laws as were already in force in other parts of the Colony.

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*continued.*

In 1895 the Governor, "in virtue of powers vested in me by law," including the Act above mentioned, issued a proclamation which set aside the established law of Pondoland with respect to arrest, trial, conviction and punishment, and condemned the respondent untried and unheard to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the Governor.

In a petition for his discharge by the respondent, who had been arrested thereunder:—

Held, that the proclamation was ultra vires of any authority conferred upon the Governor by s. 2; or of any authority at all except that of an irresponsible sovereign, or of a supreme and unfettered legislature. SIR JOHN GORDON SPRIGG *v.* SIGCAU - - - - P. C. 238

11. —— **CEYLON**—*Fidei Commissum—Ordinances* 21 *of* 1844, 10 *of* 1863, *and* 7 *of* 1871—*Will—Construction—Jus accrescendi.*

The law of fidei commissum is not altered by Ceylon Ordinances No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871.

Two spouses by joint will directed that after the death of the survivor the lands in suit should be created fidei commissum, so that they may not be sold, mortgaged, or in any way alienated, and that "the three children of their deceased daughter and their surviving daughter shall divide into two and inherit according to custom, and they and their descendants possess without interruption":—

Held, that, by the true construction of the will, the moiety devised to the three grandchildren was burdened with one fidei commissum, and not with three fidei commissa separately applicable to the three shares. Accordingly one-third share of such moiety did not vest absolutely in each institute, so as to pass to his heir-at-law not in the direct line of descent from the testators; but the whole vested in the three institutes jointly with benefit of survivorship and with substitution of their descendants. DONA MARIA ABEYESEKERA HAMINI *v.* DANIEL TILLEKERATNE P. C. 277

12. —— *Registration — Priority — Mortgage Bonds — Unregistered Ante-nuptial Settlement—Ceylon Land Registration Ordinance VIII. of* 1863, *s.* 39.

Held, that under s. 39 of the Ceylon Land Registration Ordinance VIII. of 1863, an unregistered deed of ante-nuptial settlement executed by a wife is postponed to subsequently registered mortgage bonds relating to the settled estates and jointly executed by both husband and wife, bonâ fide and for valuable consideration. GAUDER *v.* DASSENAIKE - - P. C. 547

13. —— **CHINA AND JAPAN**—*Ship—Collision—Crossing Vessels in Rivers—Regulations for Preventing Collisions at Sea*, 1884, *Art.* 22.

Art. 22 of the maritime rules, which relates to vessels "crossing so as to involve risk of collision," must be distinguished in its application, (1.) as regards vessels navigating the open sea; (2.) as

PRIVY COUNCIL APPEALS — CHINA AND JAPAN—*continued.*

regards vessels passing along the winding channels of rivers. In the latter case the vessels must follow, and must be known to intend to follow, the curves of the river bank:—

Held, in this case, that the defendant vessel, though she ported her helm, kept the course prescribed by the nature of the locality; and that at the moment of porting the vessels were not crossing vessels within the meaning of art. 22, since the reasonable inference, having regard to the locality and their previous courses, was that they would avoid collision.

The Leverington, (1886) 11 P. D. 117, distinguished. OWNERS OF NORWEGIAN S.S. "NORMANDIE" *v.* OWNERS OF BRITISH S.S. "PEKIN." THE "PEKIN" - - - - P. C. 532

14. —— **GOLD COAST COLONY, WESTERN PROVINCE** — *Barrister and Solicitor — Order striking off the Roll reversed—Practice.*

Where the Court, having rightly acquitted a barrister and solicitor of fraudulent intent in having antedated a mortgage deed which he had drawn for the mortgagor, and in having inserted in it the sum of 250*l.* for 150*l.*, nevertheless removed his name from the roll for having put the mortgage in evidence on behalf of the mortgagee in an interpleader suit without informing the Court that the date was false:—

Held, that the second charge fell with the first, there being no evidence that the appellant had any reason to believe that the mortgagee had not, as he stated in evidence, advanced the consideration mentioned in the deed at or before the date it bore; and it also appearing that it was immaterial to the question at issue on the interpleader whether the deed was antedated or not. *Ex parte* RENNER - - - P. C. 218

15. —— **JAMAICA**—*Practice—Misdirection—Withdrawal of Facts from Jury—Setting aside Verdict—Ejectment Action.*

Where, in an action of ejectment, the plaintiffs' title is admitted, it is misdirection to withdraw the facts from the jury (who could not agree) and direct a verdict for the defendants on the ground that the plaintiffs had not proved possession during any part of the statutory period. Evidence having been submitted which, if believed, proved their possession of part of the lands sued for, a new trial was rightly ordered. KINGSTON RACE STAND *v.* MAYOR AND COUNCIL OF KINGSTON - - - - P. C. 509

16. —— **JAPAN**—*Practice—Special Leave to Appeal in Criminal Cases—Consular Court in Japan—Jurisdiction—Foreign Jurisdiction Act* (6 & 7 *Vict. c.* 94).

Under the Foreign Jurisdiction Act (6 & 7 Vict. c. 94) Her Majesty has power to constitute for Japan a Court by Order in Council with a jury of five with jurisdiction over Her Majesty's subjects.

The rule as to special leave to appeal in criminal cases laid down in *In re Dillet*, (1887) 12 App. Cas. 459, re-affirmed. *Ex parte* CAREW P. C. 719

17. —— **NATAL**—*Practice—Appeal—Company—Construction of Articles of Association—Power of Chairman to refuse Adjournment of a Meeting—Special leave to Appeal given at the Hearing.*

PRIVY COUNCIL APPEALS—NATAL—*contd.*

At the hearing of an appeal it appeared doubtful whether the order appealed against was a final judgment or had the effect of a definitive sentence; but it also appeared that the questions in controversy on the face of the pleadings were of much importance, and that a determination of them might put an end to further litigation. Accordingly special leave to appeal was granted.

An article of association provided that "the chairman may with the consent of the members present at any meeting adjourn the same, &c." :—

Held, that, upon the true construction thereof, the chairman is not bound to adjourn a meeting, even though a majority of those present desire the adjournment; and that he can, after rejecting a motion for adjournment, declare a provisional agreement specified in the circular convening the meeting to be confirmed.

Semble, such confirmation is not affected by any statement of the chairman as to its effect even if incorrect. SALISBURY GOLD MINING COMPANY *v.* HATHORN - - - P. C. 268

18. —— *Practice—Verdict—Jurisdiction of Court as to setting it aside—Law of Natal.*

The law of Natal does not authorize judges to set aside a verdict as if they were a court of appeal upon questions of fact.

Where a jury had found that a binding agreement had been entered into between appellant and respondents, and had given a verdict for damages for its breach:—

Held, that by the law of Natal the verdict could not be set aside unless it were one which the jury could not reasonably find. PEARSE *v.* SCHWEDER & CO. - - - P. C. 520

19. —— **NEW SOUTH WALES**—*Evidence—Admissibility—Parol Evidence — Written Agreement.*

Parol evidence cannot be said to be improperly admitted as contradicting or varying a written agreement, when it relates to the circumstances under which the plaintiff's name was appended to a document which was no part of the agreement, but which was placed before him for signature by the defendant after the agreement was concluded. BANK OF AUSTRALASIA *v.* PALMER - - - - - P. C. 540

20. —— *Malicious Prosecution—Mens rea—*11 *Vict. No.* 4, *s.* 7*—Construction—Statutory Offence.*

By s. 7 of Act 11 Vict. No. 4, a sale of wool under a lien "with a view to defraud," without the written consent of the lienee is made a punishable offence; a like sale of stock is made so independently of a like intent.

In an action for malicious prosecution thereunder, it appeared that the plaintiff had sold stock of which the defendant bank was lienee, without intent to defraud, and with the bank's oral consent:—

Held, that on the true construction of the above section, an intent to defraud was not an element of the statutory offence charged, that this was matter for decision by the judge, and that a verdict must be entered for the defendant.

An intention to offend against the penal pro-

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

visions of an Act constitutes mens rea; and was proved by the plaintiff's knowledge that there was no written consent. BANK OF NEW SOUTH WALES *v.* PIPER - - - **P. C. 383**

21. —— *Ship—Average Bond—Average Statement—No Duty to employ an average Stater.*

Where, by an average bond executed at the port of discharge, consignees of cargo undertook to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contribution to which they were liable might be ascertained and adjusted "in the usual manner":—

Held, that these words did not imply as a condition of the obligation that the shipowners should employ an average stater at the port of discharge.

Simonds v. *White*, (1824) 2 B. & C. 805, explained.

A shipowner may make out his own average statement, and is not bound to employ an average stater either at the port of discharge or elsewhere. WAVERTREE SAILING SHIP COMPANY *v.* LOVE **P. C. 373**

22. —— **VICTORIA** — *Administration and Probate Act*, 1890 (54 *Vict. No.* 1060), *s.* 97—*Valuation of Testator's Estate—Bank Deposit Receipts—Liability on Bank Shares.*

Held, that in a statement of a testator's estate under s. 97 of the Administration and Probate Act, 1890, bank deposit receipts should be valued at the price which they would fetch in the market, and not according to the amounts appearing on the face of them to be payable; also, that sums payable in respect of bank shares at the times mentioned in various schemes for the reconstruction of those banks are debts of the deceased, and may be deducted from the sum total of the assets in order to ascertain the balance liable to probate duty. MASTER IN EQUITY OF SUPREME COURT OF VICTORIA *v.* PEARSON - **P. C. 214**

PROBATE DUTY — Foreign mortgage — Local situation of asset - - - **11**
See REVENUE. 2.

—— Valuation of testator's estate—Bank shares
See PRIVY COUNCIL APPEALS. 22. **214**

PROLONGATION—Petition by assignee of inventor - - - - **249**
See PATENT.

PROOF—Onus probandi—Collision at anchor
See SHIP. 3. **351**

PUNISHMENT—Arbitrary, illegal proclamation of—Legislative power - - **238**
See PRIVY COUNCIL APPEALS. 10.

PURCHASE — Estate tail—Heirs—Gift over—Descent—Rule in *Shelley's Case* - **658**
See WILL.

QUEBEC—Laws of - - - **358, 527**
See PRIVY COUNCIL APPEALS. 7, 8.

RAILWAY—*Station—Right of Railway Company to exclude from the Station Persons other than Travellers—Exclusion of Hotel Servant wearing Hotel Badge—Trespass—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31)—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48).

Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway; and may impose upon the rest of the public any terms they think proper as the condition of admittance. And it follows that a railway company who have an hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform with the condition that on those occasions no hotel servant shall wear a distinctive badge or livery.

So *held* (Lord Morris dissenting), reversing the decision of the Second Division of the Court of Session.

The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or privilege belongs exclusively to the Railway Commissioners. PERTH GENERAL STATION COMMITTEE *v.* ROSS **H. L. (Sc.) 479**

—— Section of, capable of sale—Jurisdiction of Court - - - - **254**
See PRIVY COUNCIL APPEALS. 4.

RANGOON—Collision at anchor - - **351**
See SHIP. 3.

RATE—Public park—Rateable value—Beneficial occupation - - - - **625**
See POOR-RATE.

RECEIVER—Liability for goods ordered by—Principal and agent - - **575**
See COMPANY. 3.

REDEMPTION—Without consent of lender—Loan—Guardians of the poor - **647**
See POOR LAW.

REGISTRATION—Ceylon Land Registration Act—Priority - - - - **547**
See PRIVY COUNCIL APPEALS. 12.

REMOTENESS OF DAMAGE—Collision—Loss of use of dredger - - - **596**
See SHIP. 5.

REMOVAL OF WRECK—Right to recover expenses - - - - **615**
See SUMMARY JURISDICTION.

REPAYMENT—Costs—Reversal of judgment—Solicitor - - - - **172**
See PRACTICE. 1.

RESCISSION — Contract — One-man company—Debts of founder - - - **22**
See COMPANY. 2.

RESTRAINT ON ANTICIPATION — Costs — Appeal—Married woman - - **177**
See HUSBAND AND WIFE.

REVENUE—*Income Tax—Deduction—Assessment of Profits or Gains—Payment to retiring Manager—"Sum employed as Capital"—Income Tax Act* 1842 (5 & 6 *Vict. c.* 35) *s.* 100 *Sched. D Cases* 1 *and* 2 *r.* 1.

Upon the transfer of an insurance business the transferees agreed to take into their service

REVENUE—*continued.*
the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables. The transferees retained the manager's services for a short time and then paid him a gross sum in commutation of his salary. They claimed to deduct that sum in estimating their profits for income tax:—

Held, that the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, that the payment was therefore a "sum employed as capital" and could not be deducted.

The decision of the Court of Appeal, [1896] 1 Q. B. 41, affirmed upon the above ground. ROYAL INSURANCE COMPANY *v.* WATSON (SURVEYOR OF TAXES) - - - **H. L. (E.) 1**

2. —— *Probate Duty—Foreign Mortgage—Local Situation of Asset.*

A testator, who died domiciled in England, by his will after bequeathing legacies gave the residue of his real and personal estate to his executors in trust for his wife for life, and by a codicil gave one-fourth of his "said residuary real and personal estate" to his wife absolutely. His will was proved in England by his executors domiciled in England. His estate included mortgages on real property in New Zealand. His wife afterwards died and her will was proved in England. At her death her husband's estate had not been fully administered, the clear residue had not been ascertained, and no appropriation had been made of the New Zealand mortgages or of any securities to particular shares of the ultimate residue:—

Held, that the right of the wife's executors was, not to one-fourth or any part of the mortgages in specie, but to require her husband's executors to administer his personal estate and to receive from them one-fourth part of the clear residue, that this was an English asset of the wife's estate, and that probate duty was therefore payable under her will upon one-fourth part of the value of the New Zealand mortgages.

The decision of the Court of Appeal, [1896] 1 Q. B. 354, affirmed. LORD SUDELEY *v.* ATTORNEY-GENERAL - - - **H. L. (E.) 11**

3. —— *Succession Duty—Policy of Insurance—The Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 2—*The Customs and Inland Revenue Acts*, 1881, 1889, 44 & 45 *Vict. c.* 12, *s.* 38, *and* 52 & 53 *Vict. c.* 7, *s.* 11.

By gratuitous assignation dated 1883 a father assigned to his daughter policies of insurance on his own life on which for many years he had paid the premiums. From 1883 the premiums on the policies were paid solely by the daughter. The father died in 1890, and the daughter thereupon received the money due under the policies:—

Held, affirming the decision of the First Division of the Court of Session, that neither succession duty nor account duty was payable by the daughter. LORD ADVOCATE *v.* FLEMING *or* ROBERTSON - - - **H. L. (Sc.) 145**

REVERSAL OF JUDGMENT—Costs—Repayment of—Solicitor - - - **172**
See PRACTICE. 1.

RIVER—Crossing vessels in—Regulations for preventing collisions - - - **532**
See PRIVY COUNCIL APPEALS. 13.

—— Opening locks on — Prescription — Lost grant - - - - **696**
See EASEMENT.

—— Pollution of—Right of complainant to interrogate—Discovery - - **550**
See PRACTICE. 2.

SAILING RULES—Regulations for Preventing Collisions at Sea, 1884, art. 22 - **532**
See PRIVY COUNCIL APPEALS. 13.

SALE—Purchase by one co-tenant—Mortgagee, Duties of - - - - **180**
See MORTGAGE.

SALVAGE — Jurisdiction — Gas float—County Court - - - - **337**
See SHIP. 7.

SCOTTISH LAW—Maritime lien for damage by collision - - - - **97**
See SHIP. 6.

—— Stream—Diversion of spring—Covenant
See WATER. **129**

—— Street—Obstruction—Snow—Tramways
See NUISANCE. **111**

—— Succession duty—Policy of insurance **145**
See REVENUE. 3.

SEPARATE ESTATE—Married woman—Costs—Appeal - - - - **177**
See HUSBAND AND WIFE.

SEPARATION — Judicial — Cruelty — "Legal cruelty" - - - - **395**
See DIVORCE. 2.

SETTING ASIDE VERDICT — Jurisdiction of Court as to - - - - **520**
See PRIVY COUNCIL APPEALS. 18.

—— Misdirection — Withdrawal of facts from jury - - - - **509**
See PRIVY COUNCIL APPEALS. 15.

SETTLEMENT — Unregistered ante-nuptial — Mortgage bonds—Priority - **547**
See PRIVY COUNCIL APPEALS. 12.

SHARES.
See COMPANY.

—— Probate duty—Valuation of testator's estate
See PRIVY COUNCIL APPEALS. 22. **214**

SHELLEY'S CASE, (1581) 1 Rep. 93 b—Rule in
See WILL. **658**

SHIP—*Collision—Compulsory Pilotage—"Trading"—"Ships trading from any Port in Great Britain" to Port North and East of Brest—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60) *s.* 625 *sub-s.* 3.

By the Merchant Shipping Act 1894 s. 625 sub-s. 3, "Ships trading from any port in Great Britain within the London district to any port in Europe north and east of Brest," are when not carrying passengers exempted from compulsory pilotage in the London district.

A British ship, laden with a cargo from the River Plate to Rotterdam and with cattle for

SHIP—*continued.*

London, discharged the cattle in London and proceeded with the cargo to Rotterdam:—

Held, that whilst the ship was proceeding from London to Rotterdam she was (though she took in no cargo in London) "trading" from London to Rotterdam within the meaning of the statute, and was therefore exempt from compulsory pilotage in the London district.

The decision of the Court of Appeal, [1896] P. 281, affirmed. OWNERS OF STEAMSHIP "EDENBRIDGE" *v.* GREEN. THE "RUTLAND" H. L. (E.) 333

2. —— *Collision — Damages — Contract overriding Limitation of Liability—Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63) *s.* 54.

Two yachts were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom.' One of the yachts in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into and sank the other yacht:—

Held, that there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other, and that upon the true construction of the rules the words "all damages" excluded the operation of s. 54 of the Merchant Shipping Act Amendment Act 1862 which limited the liability to 8*l.* per ton.

The decision of the Court of Appeal, [1895] P. 248, affirmed. CLARKE *v.* EARL OF DUNRAVEN. THE "SATANITA" - - - H. L. (E.) 59

3. —— *Collision at Anchor—Duty of Colliding Vessel—Duty at Anchor—Onus probandi.*

When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, the onus is on her to justify her conduct. She cannot be excused when it is shewn that she had not a sufficient look-out. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, and to do everything in his power to avert or minimize a collision. If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, and it must be shewn that any alternative course would have prevented or mitigated the collision. "MARY" TUG COMPANY *v.* BRITISH INDIA STEAM NAVIGATION COMPANY. THE "MEANATCHY" P. C. 351

4. —— *Collisions at Sea—Art.* 18 *of the Regulations for Preventing—Reasonable Delay.*

Art. 18 of the Regulations under the Merchant Shipping Act, which says, "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is sufficiently complied with though a delay of a few seconds has occurred.

The Court is not bound to hold that compliance must be made the very moment when danger becomes apparent.

The Emmy Haase, (1884) 9 P. D. 81, approved. OWNER OF S.S. "KWANG TUNG" *v.* OWNERS OF S.S. "NGAPOOTA." THE "NGAPOOTA" - - - - - P. C. 391

5. —— *Collision—Damage by—Loss of Use of Dredger—Remoteness of Damage—Mersey Harbour Trustees.*

Owing to a collision with a ship (the ship being in fault) a steam dredger was injured and the owners were deprived of the use of it for some weeks and the dredging works were delayed. The dredger belonged to trustees charged with the duty of maintaining a harbour and waterway, deriving their funds from rates and not entitled to distribute profits. The trustees having brought a collision suit in the Admiralty against the shipowners;—

Held (Lord Morris dissenting), reversing the decision on this point of the Court of Appeal, [1896] P. 192, that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger. OWNERS OF No. 7 STEAM SAND PUMP DREDGER *v.* OWNERS OF SS. "GRETA HOLME" THE "GRETA HOLME" H. L. (E.) 596

6. —— *Maritime Lien for Damage by Collision —Mortgagee—Scottish Law.*

The maritime law of Scotland being the same as that of England, the law of Scotland recognises a maritime lien in cases of collision.

In order to render a ship liable to a maritime lien for injury caused the ship itself must be the instrument which causes the damage.

The Bold Buccleugh, (1851) 7 Moo. P. C. 267), approved. CURRIE *v.* M'KNIGHT H. L. (Sc.) 97

7. —— *Salvage—Jurisdiction—County Court —Gas Float—Beacon or Buoy—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 458, 476 —*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.

The jurisdiction of the Admiralty over salvage does not extend to all property exposed to perils of the sea and used to assist navigation.

A gas float, shaped like a boat, but neither intended nor fitted to be navigated, was moored in tidal waters to give light to vessels and went adrift in a storm:—

Held, that not being a ship or part of a ship or of her apparel or cargo the structure was not the subject of a claim for salvage within the Admiralty jurisdiction.

The decision of the Court of Appeal, [1896] P. 42, affirmed. WELLS *v.* OWNERS OF GAS FLOAT WHITTON No. 2. GAS FLOAT WHITTON No. 2 H. L. (E.) 337

—— Average bond—No duty to employ an average stater - - - 373
See PRIVY COUNCIL APPEALS. 21.

—— Crossing vessels in rivers—Regulations for preventing collisions - - 532
See PRIVY COUNCIL APPEALS. 13.

SIMONY—False declaration against—Immorality
See ECCLESIASTICAL LAW. 226

SNOW—Street—Obstruction—Tramways - 111
See NUISANCE.

SOLICITOR—Costs—Repayment of—Reversal of judgment - - - - 172
See PRACTICE. 1.

SOLICITOR—*continued.*
—— Order striking off the Roll reversed—Practice - - - - - - 218
See PRIVY COUNCIL APPEALS. 14.
STATION—Right of railway company to exclude from station persons other than travellers - - - - - - 479
See RAILWAY.
STATUTES.
I. IMPERIAL STATUTES.
2 & 3 Will. 4, c. 71, s. 2—*Prescription* 696
See EASEMENT.
5 & 6 Vict. c. 35, s. 100, Sched. D, Cases 1 and 2, r. 1—*Income Tax* - - 1
See REVENUE. 1.
6 & 7 Vict. c. 94—*Foreign Jurisdiction* - 719
See PRIVY COUNCIL APPEALS. 16.
10 & 11 Vict. c. 27, s. 56—*Harbours and Docks*
See SUMMARY JURISDICTION. 615
16 & 17 Vict. c. 51, s. 2—*Succession Duty* 145
See REVENUE. 3.
17 & 18 Vict. c. 31—*Railway and Canal Traffic*
See RAILWAY. 479
17 & 18 Vict. c. 104, ss. 458, 476—*Merchant Shipping* - - - - - 337
See SHIP. 7.
20 & 21 Vict. c. 85, s. 22—*Matrimonial Causes*
See DIVORCE. 2. 395
25 & 26 Vict. c. 63, s. 54—*Merchant Shipping*
See SHIP. 2. 59
25 & 26 Vict, c. 89, ss. 6, 8, 30, 43—*Companies*
See COMPANY. 2. 22
—— —— s. 38 - - - - - 299
See COMPANY. 4.
30 & 31 Vict. c. 131, s. 25 - - 299
See COMPANY. 4.
31 & 32 Vict. c. 71, s. 3—*County Courts—Admiralty* - - - - - 337
See SHIP. 7.
34 & 35 Vict. c. 11, s. 2—*Poor Law Loans* 647
See POOR LAW.
36 & 37 Vict. c. 48—*Railways and Canals* 479
See RAILWAY.
39 & 40 Vict. c. 75, ss. 3, 10—*Rivers Pollution Prevention* - - - - - 550
See PRACTICE. 2.
41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives* - - - - - 633
See HIGHWAY.
42 & 43 Vict. c. 49, s. 31—*Summary Jurisdiction* - - - - - - 556
See LICENSING ACTS.
44 & 45 Vict. c. 12, s. 38—*Customs and Inland Revenue* - - - - - 145
See REVENUE. 3.
45 & 46 Vict. c. 61, s. 2; s. 7, sub-s. 3; s. 73—*Bills of Exchange* - - - 90
See BILL OF EXCHANGE.
46 & 47 Vict. c. 57—*Patents and Trade Marks*
See PATENT. 249
47 & 48 Vict. c. 68—*Matrimonial Causes* 395
See DIVORCE. 2.
52 & 53 Vict. c. 7, s. 11—*Customs and Inland Revenue* - - - - - 145
See REVENUE. 3.
STATUTES—*continued.*
52 & 53 Vict. c. 63, s. 13, sub-s. 11—*Interpretation* - - - - - 556
See LICENSING ACTS.
53 & 54 Vict. c. ccxliii., ss. 4, 5—*London Council (General Powers)* - - 625
See POOR-RATE.
55 & 56 Vict. c. 32, ss. 2, 12—*Clergy Discipline* - - - - - 226
See ECCLESIASTICAL LAW.
56 & 57 Vict. c. 63, s. 2—*Married Women's Property* - - - - - 177
See HUSBAND AND WIFE.
57 & 58 Vict. c. 60, s. 625, sub-s. 3—*Merchant Shipping* - - - - - 333
See SHIP. 1.
II. COLONIAL STATUTES.
British Honduras, Statutes of:
Consolidated Laws of 1887, c. 19, s. 5—*Limitation* - - - - - - 367
See PRIVY COUNCIL APPEALS. 1.
—— —— c. 106, s. 30—*Lands Titles Registry*
See PRIVY COUNCIL APPEALS. 1. 367
Canada, Statutes of:
30 & 31 Vict. c. 3, s. 92, sub-ss. 2, 9—*British North American Act* - - - 231
See PRIVY COUNCIL APPEALS. 5.
—— —— ss. 109, 111, 112 - - - 199
See PRIVY COUNCIL APPEALS. 3.
British Columbia.
Consolidated Statutes, c. 51, s. 1 - - 193
See PRIVY COUNCIL APPEALS. 2.
Ontario.
Revised Statutes of Ontario, c. 194, s. 51, sub-s. 2 - - - - - 231
See PRIVY COUNCIL APPEALS. 5.
Quebec.
55 & 56 Vict. c. 77, s. 5—*St. Henri Light and Power Company* - - - 527
See PRIVY COUNCIL APPEALS. 8.
Revised Statutes, art. 4722 (1), (5)—*Companies*
See PRIVY COUNCIL APPEALS. 7. 358
Cape of Good Hope, Statutes of:
Pondoland Annexation Act, 1894, No. 5, s. 2
See PRIVY COUNCIL APPEALS. 10. 238
Ceylon, Statutes of:
Ordinance of 1844, No. 21, s. 20 - - 277
See PRIVY COUNCIL APPEALS. 11.
Ordinance of 1863, No. 8—*Registration of Titles to Land* - - - 547
See PRIVY COUNCIL APPEALS. 12.
—— —— No. 10 - - - - 277
See PRIVY COUNCIL APPEALS. 11.
Ordinance of 1871, No. 7, s. 3 - - 277
See PRIVY COUNCIL APPEALS. 11.
New South Wales, Statutes of:
11 Vict. No. 4, s. 11—*Liens on Wool* - 383
See PRIVY COUNCIL APPEALS. 20.
Victoria, Statutes of:
54 Vict. No. 1060, s. 97—*Administration and Probate* - - - - 214
See PRIVY COUNCIL APPEALS. 22.

STREAM — Lease — Covenant — Diversion of spring - - - - 129
See WATER.

STREET—Obstruction— Tramways — Snow and salt - - - - - 111
See NUISANCE.

—— Right to excavate—Power to lay wires underground - - - 527
See PRIVY COUNCIL APPEALS. 8.

SUCCESSION DUTY—Life policy of insurance—Account duty - - - 145
See REVENUE. 3.

SUMMARY JURISDICTION—*Jurisdiction of High Court—Right to recover in Court of Summary Jurisdiction— Wrecks, Removal of — Harbours, Docks, and Piers Clauses Act* 1847 (10 & 11 *Vict.* c. 27) *s.* 56.

Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction: he can only take proceedings in the latter court.

The construction of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, adopted in *The Crystal*, [1894] A. C. 508, applied to s. 47 of the Aire and Calder Navigation Act, 1889 (52 & 53 Vict. c. xxxii.). BARRACLOUGH *v.* BROWN - - - - H. L. (E.) 615

—— Appeal from licensing justices — Costs against objector - - - 556
See LICENSING ACTS.

TAX—Income tax—Deduction - - 1
See REVENUE. 1.

TENANTS IN COMMON—Purchase by one cotenant—Mortgagee, duties of - 180
See MORTGAGE.

TIME—Policy of insurance—Exception—Loss of freight - - - - 609
See INSURANCE, MARINE.

TITLE — Registered — Adverse possession — British Honduras - - - 367
See PRIVY COUNCIL APPEALS. 1.

TRADE NAME—*Common Law Right—Name indicating Manufacturer — Imitation of Rival Traders' Goods—Injunction—Fraud.*

The respondent had for years manufactured and sold under the name "Yorkshire Relish" a sauce made according to a secret recipe, and the term "Yorkshire Relish" had come to mean that particular manufacture. The appellants began to make a sauce, nearly resembling the respondent's sauce, which they sold as Yorkshire Relish so as to induce purchasers to believe that it was the respondent's "Yorkshire Relish," although the purchasers did not in fact know the name of the respondent in connection with the sauce:—

Held, that the respondent was entitled to an injunction restraining the appellants from using the words "Yorkshire Relish" in connection with their sauce without clearly distinguishing it from the respondent's sauce.

The decision of the Court of Appeal, [1896] 2 Ch. 54, affirmed. BIRMINGHAM VINEGAR BREWERY COMPANY *v.* POWELL H. L. (E.) 710

TRAFFIC— Extraordinary — Person by whose order such traffic has been conducted
See HIGHWAY. 633

TRAMWAY—Street— Obstruction — Snow and salt - - - - - 111
See NUISANCE.

TRESPASS—Right of railway company to exclude from station persons other than travellers - - - - 479
See RAILWAY.

UNDERGROUND WIRES—Power to lay—Right to excavate streets - - - 527
See PRIVY COUNCIL APPEALS. 8.

VERDICT—Setting aside—Jurisdiction of Court as to - - - - - 520
See PRIVY COUNCIL APPEALS. 18.

—— Setting aside—Withdrawal of facts from jury - - - - - 509
See PRIVY COUNCIL APPEALS. 15.

VICTORIA—Laws of - - - - 214
See PRIVY COUNCIL APPEALS. 22.

WARRANDICE CLAUSE— Lease — Covenant— "Stream" - - - - 129
See WATER.

WATER—*Diversion of Spring*—"*Stream*"—*Lease —Covenant— Warrandice Clause.*

Water percolating discontinuously through or along strata cannot be described as a "stream."

A lessor demised by lease a distillery, cottages, thirteen and a half acres of land, with two ponds, "together with right to the water in the said ponds and in the streams leading thereto." The lease also contained the usual warrandice clause. The lessor sunk a tank on ground outside but adjoining the demised subjects, and drew off from marshy ground percolating water which would have found its way eventually into one of the ponds:—

Held (Lord Halsbury L.C. dissenting), affirming the decision of the Second Division of the Court of Session, that water percolating through the ground towards the pond was not water in any stream leading to the pond:

Held, secondly, by the whole House, that, assuming an implied obligation on the part of the lessor not to diminish the water supply to the ponds, there had been no breach. M'NAB *v.* ROBERTSON - - - H. L. (Sc.) 129

—— Required for mining purposes—Monopoly of supply - - - - 515
See PRIVY COUNCIL APPEALS. 9.

WILL—*Construction of—Estate Tail—Issue — Heirs—Gift Over—Descent—Purchase—Rule in Shelley's Case.*

A testator devised lands to trustees in trust to receive the rents and profits for the use and benefit of such of his child or children as should be living at his death, and to apply such rents and profits or so much thereof as the trustees should deem right and proper in the maintenance and education of such child or children until

WILL—*continued.*
majority or marriage, and from and after majority or marriage in trust to permit and suffer such child or children, as they should severally attain the age of twenty-one or be married, to take the rents and profits, if more than one, in equal shares for her, his, and their own use and benefit for her, his, or their lives; and if he left only one child then to permit and suffer such one child to take the rents and profits for her or his sole use and benefit for her life; and he declared that from and after the death of such child or children, the trustees should stand seised of the lands in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one to be equally divided between them, such lands to be legally conveyed to such heirs of any child or children in equal shares as they should respectively attain the age of twenty-one or be married, and to their respective heirs and assigns for ever, with power in the meantime to apply the rents and profits in the maintenance and education of such heirs of his child or children. And if he should die leaving no child or children, or issue of any child or children, or if such child or children as he should leave and the issue of such child or children should die before he or they should attain the age of twenty-one or be married—then a gift over.

The testator died leaving only one child surviving him: that child married and left a son who reached twenty-one:—

Held, that the legal estate vested in the trustees throughout; that the estates both of the child or children and of the heirs of their body were equitable; that the rule in *Shelley's Case*, (1581) 1 Rep. 93 b, applied, and that the testator's child took an estate tail.

A will devised lands to W. in fee simple. By a codicil the testator devised the lands upon the

WILL—*continued.*
same trusts as were set forth in the will, but nevertheless upon the special trust, and his will was, that it should not be lawful for W. at any time during his life to suffer any recovery or enter into any deed, matter, or thing whereby to cut off, dock, or destroy the entail of his said freehold lands:—

Held, that the codicil did not cut down the fee simple estate given by the will to an estate tail. VAN GRUTTEN *v.* FOXWELL. FOXWELL *v.* VAN GRUTTEN - - - **H. L. (E.) 658**

—— Fidei commissum—Jus accrescendi - **277**
See PRIVY COUNCIL APPEALS. 11.

WINDING-UP OF COMPANY 22, 156, 299, 575
See COMPANY. 2—5.

WIRES—Power to lay underground—Right to excavate streets - - - **527**
See PRIVY COUNCIL APPEALS. 8.

WORDS—"Fictitious or non-existing person" **90**
See BILL OF EXCHANGE.

—— "Issued" - - - - **90**
See BILL OF EXCHANGE.

—— "Legal cruelty" - - - **395**
See DIVORCE. 2.

—— "Proceeding instituted" - - **177**
See HUSBAND AND WIFE.

—— "Stream" - - - - **129**
See WATER.

—— "Sum employed as capital" - - **1**
See REVENUE. 1.

—— "Trading" - - - - **333**
See SHIP. 1.

WRECK—Removal of—Right to recover expenses - - - - **615**
See SUMMARY JURISDICTION.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

BIBL. LOVANIN

UL 17 JUL 1967